



## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

#### 44 CFR Part 206

[Docket ID: FEMA-2019-0012]

RIN 1660-AB00

#### Public Assistance Appeals and Arbitrations

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Final rule.

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**SUMMARY:** This final rule implements the new right of arbitration authorized by the Disaster Recovery Reform Act of 2018 (DRRA) and revises the Federal Emergency Management Agency's regulations regarding first and second Public Assistance appeals.

**DATES:** This rule is effective on January 1, 2022. Proposed information collection comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** The docket for this rulemaking is available for inspection using the Federal eRulemaking Portal: <http://www.regulations.gov> and can be viewed by following that website's instructions.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting "Currently under 30-day Review - Open for Public Comments" or by using the search function.

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## **SUPPLEMENTARY INFORMATION:**

### **I. Proposed rule**

On August 31, 2020, the Federal Emergency Management Agency (FEMA) published a Notice of Proposed Rulemaking (NPRM) (85 FR 53725) proposing to revise its current Public Assistance (PA) appeals regulation at 44 CFR 206.206 to add in the new right to arbitration under the Disaster Recovery Reform Act of 2018 (DRRA)<sup>1</sup>, in conjunction with some revisions to the current appeals process. The DRRA adds arbitration as a permanent alternative to a second appeal under the PA Program. Additionally, applicants that have had a first appeal pending with FEMA for more than 180 calendar days may withdraw such appeal and submit a request for arbitration. In both cases, the amount in dispute must be greater than \$500,000, or greater than \$100,000 for an applicant for assistance in a rural area. The other major proposed revisions to 44 CFR 206.206 included adding definitions; adding subparagraphs to clarify what actions FEMA may take and will not take while an appeal is pending and stating that FEMA may issue separate guidance as necessary, similar to current 44 CFR 206.209(m); adding a finality of decision paragraph; requiring electronic submission for appeals and arbitrations documents; and clarifying overall time limits for first and second appeals.

These proposed rules for arbitration are separate and distinct from the arbitration provisions located in 44 CFR 206.209. Under § 206.209, applicants may request arbitration to resolve disputed PA applications under major disaster declarations for Hurricanes Katrina and Rita, pursuant to the authority of the American Recovery and

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<sup>1</sup> Disaster Recovery Reform Act of 2018, Public Law 115-254, 132 Stat. 3186 (Oct. 5, 2018), 42 U.S.C. 5189a.

As amended by Section 1219 of the DRRRA, 42 U.S.C. 5189a(d) names the Civilian Board of Contract Appeals (CBCA) as the entity responsible for conducting public assistance arbitrations. Therefore, FEMA recommends that applicants review the CBCA regulations at 48 CFR Part 6101, Rules of Procedure of the Civilian Board of Contract Appeals, and 48 CFR Part 6106, Rules of Procedure for Arbitration of Public Assistance Eligibility or Repayment, for additional CBCA rules of procedure, as both cover FEMA public assistance arbitrations.

## **II. Discussion of Public Comments and FEMA's Responses**

The public comment period of the NPRM closed on October 30, 2020. FEMA received germane comments from six separate commenters. The first anonymous commenter [FEMA-2019-0012-0002] was unconditionally supportive of the NPRM, as they found the DRRRA population thresholds fair. The second commenter, a member of the public [FEMA-2019-0012-0003], addressed five separate issues regarding the NPRM in their comment including: suggesting the use of “applicant” to refer to all entities; suggesting the use of “appellant” instead of “applicant” and “subrecipient”; stating that using the date of issuance of the FEMA determination instead of the date the “appellant” views the FEMA determination does **not** provide clarity; suggesting that the “appellant” now has 150 days to make a complete appeal with the new 30-day deadline to provide additional information; and questioning whether the NPRM removed the first 60-day requirement to make the entire deadline 120-days regardless of when each entity appeals so long as it is within 120 days. The third commenter, also a member of the public [FEMA-2019-0012-0004], suggested FEMA adjust the amount in dispute thresholds for hyper-inflation. This commenter also submitted a duplicative comment which was

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<sup>2</sup> American Recovery and Reinvestment Act of 2009, Public Law 111-5, 123 Stat. 115 (Feb. 17, 2009), 26 U.S.C. 1 note.

withdrawn [FEMA-2019-0012-0005]. The second anonymous commenter submitted an unrelated comment [FEMA-2019-0012-DRAFT-0006], which was not posted to the Docket. The fourth commenter, from a State Emergency Management Agency [FEMA-2019-0012-0006], also asked whether the NPRM's combination of the applicant and recipient's 60-day submission requirements could equate to additional submission time for appeals. The fifth commenter, from the same State Emergency Management Agency [FEMA-2019-0012-0007], asked numerous questions regarding applicant and recipient proposed appeal submission timeframes. The sixth commenter, a State Division of Emergency Management (DEM) [FEMA-2019-0012-0008], generally supports the effort to amend the regulations. However, the State DEM believes many of the changes proposed in the NPRM conflict with the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act)<sup>3</sup> and expressed concern with FEMA removing its own deadlines while strictly applying them to applicants and recipients. The State DEM included attachments of cases -- or parts of cases -- and a detailed table of their comments.

#### *A. Adjustment Amount in Dispute Thresholds*

Under Section 1219 of the DRRRA, in order to request arbitration a PA applicant must dispute an amount that exceeds \$500,000 (or \$100,000 for an applicant in a "rural area" with a population of less than 200,000 and outside of an urbanized area).

One member of the public [FEMA-2019-0012-0004] commented that, for the most part, the proposed changes are well thought out and stand to reason. However, the commenter suggested that the amount in dispute threshold allow for future adjustment based upon hyper-inflation. Including provisions for hyper-inflation, this commenter posited, will allow FEMA to carry out its crucial work without returning to the

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<sup>3</sup> Disaster Relief Act of 1974, Public Law 93-288, 88 Stat. 143 (May 22, 1974), as amended, 42 U.S.C. 5121 *et seq.*

rulemaking process if the dollar fluctuates in the future. A lower threshold could subsequently overwhelm the arbitration or appeal process.

Since the amount in dispute thresholds are statutorily set in Section 1219 of DRRA, it is not within FEMA's discretion to change them in this rulemaking. While FEMA appreciates the commenter's support, FEMA did not make any changes to the regulatory text at 206.206 as a result of the comment.

#### *B. Population Thresholds*

The DRRA defines a rural area to mean an area with a population of less than 200,000 outside an urbanized area. The NPRM proposed to define the term "urbanized area" to mean the area as identified by the United States Census Bureau (USCB). The USCB defines an "urbanized area" as an area that consists of densely settled territory that contains 50,000 or more people.<sup>4</sup> For clarity and to comply with publication requirements found in 1 CFR chapter I, FEMA has revised the final rule's definition of "urbanized area" as an area that consists of densely settled territory that contains 50,000 or more people.

An anonymous commenter [FEMA-2019-0012-0002] supports the different population thresholds of the NPRM. The anonymous commenter suggested that the population requirements give all areas a fair chance of receiving Federal assistance. FEMA appreciates the anonymous commenter's support but, did not make any changes to the regulatory text at 206.206 as a result of the comment.

#### *C. "Applicant/Subrecipient" Different Entities versus "Applicant" for All Entities*

A member of the public [FEMA-2019-0012-0003] commented that FEMA views the applicant/subrecipient as two different entities: an "applicant" is one that has applied for but not yet received funding, while a "subrecipient" has applied for and been awarded funding. This member of the public [FEMA-2019-0012-0003] also commented that the

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<sup>4</sup> See "Qualifying Urban Areas for the 2010 Census," 77 FR 18651, Mar. 27, 2012.

definition of "applicant" does not include "subrecipient" (although one could argue that all "subrecipients" are "applicants," but not all "applicants" are "subrecipients," so the use of "applicant" for all entities could still be correct).

The "applicant," as defined at 44 CFR 206.201(a), is a State agency, local government, or eligible private nonprofit organization (PNP) submitting an application to the recipient for assistance under the recipient's grant. The "recipient," as defined at 44 CFR 206.201(m), is the government to which a grant is awarded, and which is accountable for the use of the funds provided. The "recipient" is typically the State to which a grant is awarded.

In the NPRM, FEMA proposed changing the phrase "applicant, subrecipient, or recipient" to "applicant or recipient" since the definition of "applicant" at 44 CFR 206.201(a) already includes the term "subrecipient." Since an "applicant" submits an application to the "recipient" for assistance under the recipient's grant, the "recipient" and the "applicant" are not interchangeable phrases. It follows that the definition of "applicant" at 206.201(a) cannot include a "recipient," so FEMA disagrees with the public commenter's [FEMA-2019-0012-0003] statement that the use of "applicant" for all entities could still be correct.

Therefore, FEMA did not make any changes to the regulatory text at 206.206 as a result of the comment.

#### *D. "Appellant" versus "Applicant" and "Subrecipient"*

A member of the public [FEMA-2019-0012-0003] also commented that there is a difference in "applicant" and "subrecipient" per 44 CFR 206.201(a). FEMA disagrees with the statement that there is a difference in "applicant" and "subrecipient" per 206.201(a). As indicated above, the definition of "applicant" at 206.201(a) includes "subrecipient," but not "recipient." Therefore, FEMA did not make any changes to the regulatory text at 206.206 as a result of the comment.

The commenter further stated that the use of “appellant” allows for both “applicants” and “subrecipients” to be represented in the terminology. In the past, FEMA used the term “appellant” instead of “applicant or recipient” for the requirement of specifying the provisions in Federal law, regulator, or policy in dispute. In the NPRM, FEMA’s reason for changing from “appellant” to “applicant or recipient” was for consistency in terminology and no substantive change was intended. Since FEMA’s goal is consistency in terminology, FEMA will not add “appellant” as a defined term to paragraph (a) of 44 CFR 206.206, as it could lead to confusion for the reader as to whether it refers to an “applicant” or a “recipient.” Therefore, FEMA did not make any changes to the regulatory text at 206.206 as a result of the comment.

#### *E. Other Definitions*

The State DEM [FEMA-2019-0012-0008] commented that in 44 CFR 206.206(a), FEMA should define “Regional Administrator” because applicants submit first appeals to the appropriate FEMA Regional office and then submit second appeals to the Assistant Administrator for the Recovery Directorate. The State DEM proposed to define “Regional Administrators” as “the Administrator of the Federal Emergency Management Agency Regional Office in which the Applicant resides.”

FEMA decided against the commenter’s suggested definition of “Regional Administrator” since 44 CFR 206.2(a)(21) already provides a definition for “Regional Administrator” with general applicability throughout part 206. *Regional Administrator:* An administrator of a regional office of FEMA, or his/her designated representative. As used in these regulations, Regional Administrator also means the Disaster Recovery Manager who has been appointed to exercise the authority of the Regional Administrator for a particular emergency or major disaster.

This second sentence in the definition of *Regional Administrator* at 206.2(a)(21) is contrary to the structure proposed in the NPRM at 206.206, as it says that the Regional

Administrator also means the Disaster Recovery Manager. In the NPRM, the Regional Administrator/Disaster Recovery Manager is not making the FEMA determination. Otherwise, the submission of the first appeal to the Regional Administrator for review would mean that the Regional Administrator could review their own determination. Therefore, FEMA decided to add only the first sentence of the “Regional Administrator” definition at 206.2(a)(21) to this final rule for consistency and clarity. So, FEMA added the following definition of “Regional Administrator” to the regulatory text: *Regional Administrator* means an administrator of a regional office of FEMA, or his/her designated representative.

Both, “Administrator” and “Regional Administrator” were added to Title V of the Homeland Security Act of 2002 by the Post-Katrina Emergency Management Reform Act of 2006.<sup>5</sup> Therefore, it makes sense that they are defined terms under 44 CFR 206.206, as they are statutorily mandated FEMA positions.

The State DEM also recommended that FEMA define the term “Assistant Administrator for the Recovery Directorate.” FEMA chose not to provide a definition of “Assistant Administrator for the Recovery Directorate” since future FEMA reorganizations may change that position title. Additionally, the “Assistant Administrator for the Recovery Directorate” is not a FEMA statutorily mandated position.

Finally, the State DEM [FEMA-2019-0012-0008] suggested that FEMA define “final agency determination” to mean the decision of FEMA as provided through electronic transmission of a formal determination if the applicant or recipient does not submit a first appeal within the time limits. FEMA does not adopt the commenter’s definition because the definition in the NPRM is a more fulsome definition which covers all eventualities. In the NPRM, “final agency determination” means the decision

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<sup>5</sup> Post-Katrina Emergency Management Reform Act of 2006, 109-295, 120 Stat. 1394 (Oct. 4, 2006), 6 U.S.C. 701 note.



of FEMA, if the applicant or recipient does not submit a first appeal within the time limits provided for in paragraph (b)(1)(ii)(A) of proposed § 206.206; or the decision of FEMA, if the applicant or recipient withdraws the pending appeal and does not file a request for arbitration within 30 calendar days of the withdrawal of the pending appeal; or the decision of the FEMA Regional Administrator, if the applicant or recipient does not submit a second appeal within the time limits provided for in paragraph (b)(2)(ii)(A) of proposed § 206.206. For this reason, FEMA declines to adopt the commenter's definition. Therefore, FEMA only added the definition of "Regional Administrator" to the regulatory text at 206.206(a) as a result of the comment.

*F. First and Second Appeals' Deadlines*

Proposed paragraph 206.206(b)(1)(ii) of the NPRM addressed time limits for first appeals. Under proposed paragraph (b)(1)(ii)(A), the applicant may make a first appeal through the recipient within 60 calendar days from the date of the FEMA determination that is the subject of the appeal. Moreover, the recipient must electronically forward to the Regional Administrator the applicant's first appeal with a recommendation within 120 calendar days from the date of the FEMA determination that is the subject of the appeal. There is no recourse for the applicant if the recipient misses the deadline to forward the appeal and recommendation to the Regional Administrator. There is also no recourse for the applicant in a second appeal where the recipient does not make the deadline.

Several commenters -- including a member of the public [FEMA-2019-0012-0003], a State agency [FEMA-2019-0012-0007], and State DEM [FEMA-2019-0012-0008] -- sought clarification on when, exactly, the applicant's initial 60-day deadline is triggered. For instance, is the deadline triggered on the day the applicant views the determination [FEMA-2019-0012-0003]? Does the deadline begin once the applicant has physically received the determination paperwork [FEMA-2019-0012-0008]? As FEMA

was aware of this issue, the NPRM provided clarity by adding an electronic submission requirement for both first and second appeals. This requirement will enable FEMA to accurately track the transmittal and receipt of appeals since they will be the same date, while providing the applicant with a clear timeline for compliance. Specifically the deadline is triggered by FEMA's transmittal of the determination, not the date the applicant views the determination.

Nonetheless, a member of the public [FEMA-2019-0012-0003] questioned whether the NPRM's proposal to change the language "after receipt of a notice of the action that is being appealed" to "from the date of the FEMA determination that is the subject of the appeal" will actually assist FEMA with tracking. In her opinion, using the date of the issuance of the determination, rather than the date the "appellant" views the determination, does not provide clarity. Since the proposed language of the NPRM relies on the electronic submission for appeals, it would not matter when the FEMA determination that is subject of the appeal is viewed. With the switch to electronic submission, the date of the FEMA determination and the date of receipt are the same. Therefore, FEMA did not make any changes to the regulatory text as a result of the comments.

A State DEM [FEMA-2019-0012-0008] commented that it agrees with electronic submission to ease in tracking and ensuring timely receipt of appeals. However, the commenter stated, applicants and recipients do not always receive FEMA's determination on the same day as the date of the transmission letter. This could potentially reduce the amount of time for an applicant to appeal. In support of this comment, the State DEM submitted an emergency (as opposed to major disaster) declaration determination with what appeared to be a discrepancy between the date of receipt and the date of determination, as attachments. Upon further review, FEMA finds the discrepancy between the date of receipt and date of determination was an administrative error or an

anomaly. FEMA is taking programmatic and technological steps to tie the date of determination to date of the determination's transmittal, but should a similar error or discrepancy recur in the future FEMA would use the date of transmittal as the deadline trigger.

Nonetheless, the State DEM suggested remedy language for both first and second appeals which would start the clock on the 60-day deadline on the confirmed receipt of FEMA's determination. Further, the commenter proposed language to create a rebuttable presumption in favor of the date of receipt claimed by the applicant or recipient. Because the NPRM proposed requiring electronic submission for both applicant and recipient and the NPRM proposed FEMA simultaneously electronically notify both applicant and recipient, these concerns are unfounded. Therefore, FEMA did not make any changes to the regulatory text at 206.206(b)(1)(ii) and (b)(2)(ii) as a result of the comments.

*G. First and Second Appeals' Deadlines - 60/60-Day versus 120-Day*

A member of the public [FEMA-2019-0012-0003] queried: Is the NPRM to remove the first 60-day requirement for the appellant to appeal, and make the entire deadline 120 days regardless of when each entity appeals so long as it is within 120 days? This simplifies the timeliness requirement for all parties she stated, but the proposed language is confusing as to whether the 60-day deadline remains for the applicant. By the NPRM, she continues, the applicant could appeal on day 120 and the recipient could forward on same that day. In this scenario, the commenter believed the submission would remain timely. The commenter stated that this removes some of the intent behind the timeliness requirements for each party to responsibly review the appeal.

The applicant's 60-day deadline remains, as the Stafford Act requires it for appeals. See 423(a) of the Stafford Act. In order to resolve the confusion identified by the public commenter [FEMA-2019-0012-0003], FEMA has added regulatory text to both the first and second appeals paragraphs of the final rule for clarity and consistency.

Specifically, FEMA replaced the second to the last sentence of the appeals paragraphs of the final rule at 206.206(b)(1)(ii)(A) and (b)(2)(ii)(A) with the following: “[i]f the applicant or the recipient do not meet their respective 60-calendar day and 120-calendar day deadlines, FEMA will deny the appeal.” This is consistent with current FEMA policy. See page 40 of the Public Assistance Program and Policy Guide,<sup>6</sup> which says that “[i]f either the Applicant or Recipient does not meet the respective 60-day deadlines, FEMA will deny the appeal as untimely.”

Also in reference to the 120-day deadline, a State agency [FEMA-2019-0012-0006] inquired: Does this mean that if the applicant appeals to the recipient 45 days from the FEMA determination, that the recipient still has 120 calendar days from the date of the FEMA determination to transmit the appeal to FEMA? In the above scenario, an applicant that appeals 45 days after its FEMA determination would then leave the recipient with 75 days to forward the appeal to FEMA. The NPRM is in no way extending the 120-day deadline.

A separate comment from the same State agency [FEMA-2019-0012-0007] correctly stated that the applicant still has a firm 60-day deadline to submit its appeal to the applicant. The commenter then inquired whether FEMA will deny any appeal as untimely if the applicant submits its appeal to the recipient after the 60-day deadline, but FEMA receives the appeal within 120 days. In this scenario, the commenter is correct that FEMA would deny this appeal as untimely. Even if the recipient ultimately submitted the appeal to FEMA within 120 days from the date of determination, if an applicant submits its appeal to the recipient outside of the 60 days, it has exceeded the deadline imposed by Section 423 of the Stafford Act. As stated above, FEMA added new regulatory text in the final rule to both the first and second appeals paragraphs for clarity and consistency. The new language states that if the applicant or the recipient do not

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<sup>6</sup> Public Assistance Program and Policy Guide Version 4 (fema.gov)

meet their respective 60-calendar day and 120-calendar day deadlines, FEMA will deny the appeal.

Finally, the State DEM [FEMA-2019-0012-0008] suggested that the regulatory language was misleading because it implies that FEMA will deny all first appeals it does not receive by the recipient's 120-day deadline and is not clear that applicant's untimeliness will jeopardize the appeal. As the scenarios above make clear, both an applicant and recipient's untimeliness will continue to jeopardize either a first or second appeal based upon their respective 60-calendar day and 120-calendar day deadlines. For these reasons, FEMA made changes to the regulatory text regarding first appeals at 206.206(b)(1)(ii)(A) and regarding second appeals at (b)(2)(ii)(A) as a result of the comments.

#### *H. Denial Based Upon Timeliness*

The State DEM [FEMA-2019-0012-0008] objected to FEMA denying either a first or second appeal based upon timeliness. The State DEM argued that FEMA lacked the authority to unilaterally deny an appeal based upon timeliness because this is not specifically permitted by the Stafford Act. The State DEM stated that it was "administratively unfair" for FEMA to deny second appeals solely based on timeliness without considering the merits thereof.

The State DEM specifically proposed language prohibiting FEMA from denying a second appeal based on untimeliness if a determination on the merits would be in the applicant or recipient's favor. It offered language barring FEMA from denying an otherwise timely second appeal solely on the grounds that the relevant first appeal was untimely. To bolster its argument, the State DEM attached an exhibit wherein FEMA rejected a second appeal based on the first appeal being untimely even though, the State DEM argued, FEMA incorrectly de-obligated funds initially. Had FEMA examined the issue on the merits the argument continues, the applicant would have prevailed.

Section 423 of the Stafford Act requires an applicant to submit an appeal within 60 days. FEMA does not have the unilateral authority to alter or ignore this requirement. The State DEM's suggestions would have the effect of removing timeliness as a meaningful consideration for appeals. Further, FEMA has no ability to extend the deadlines listed in Section 423, just as it lacks express authority to waive timelines. FEMA is solely implementing requirements prescribed by law. In addition, the start of the mandatory 60-day period, the date of FEMA's determination, and the date of the applicant and recipient's receipt thereof should be identical with the implementation of electronic transmission. Since electronic transmission addresses the State DEM's concerns regarding the start of the appeals period and FEMA cannot waive, alter, or modify the 60-day appeal deadline in the Stafford Act, FEMA did not make any changes to the regulatory text at 206.206(b)(1)(ii)(A) and (b)(2)(ii)(A) as a result of these comments. However, as stated above FEMA added new regulatory text in the final rule to both the first and second appeals paragraphs for clarity and consistency. The new language states that if the applicant or the recipient do not meet their respective 60-calendar day and 120-calendar day deadlines, FEMA will deny the appeal.

The State DEM [FEMA-2019-0012-0008] also suggested that the regulatory language in 206.206(b)(3)(iii)(B)(2) of the NPRM be modified to permit requests for arbitration from untimely appeals. This comment and proposed language would render timeliness moot, as applicants could make an untimely appeal and then attempt to arbitrate the rejection on timeliness. Section 423 of the Stafford Act only permits an applicant to submit an appeal within 60 days; FEMA does not have the authority to alter or ignore this deadline. Consequently, FEMA did not make any changes to the regulatory text at 206.206(b)(3)(iii)(B)(2) as a result of these comments.

However, FEMA provided clarifying edits to 206.206(b)(3)(iii)(B)(2) in the final rule, so that an applicant understands that if they choose arbitration pursuant to Section

423(d) of the Stafford Act, as FEMA has not responded to an applicant's first appeal within 180 days, then they must withdraw the pending appeal before they file the request for arbitration. Basically, the applicant cannot arbitrate and appeal at the same time. Additionally, FEMA provided clarifying edits to 206.206(b)(3)(iii)(B)(2) to remove the phrase "and the CBCA." FEMA deleted this phrase, as a pending first appeal would not be pending before the CBCA, so the applicant would have no reason to notify the CBCA of the first appeal withdrawal.

So in the final rule, FEMA has split the first sentence of 206.206(b)(3)(iii)(B)(2) into two sentences that say if the first appeal was timely submitted, and the Regional Administrator has not rendered a decision within 180 calendar days of receiving the appeal, an applicant may arbitrate the decision of FEMA. To request arbitration, the applicant must first electronically submit a withdrawal of the pending appeal simultaneously to the recipient and the FEMA Regional Administrator. Plus, FEMA added clarifying language to the last sentence of 206.206(b)(3)(iii)(B)(2) by replacing "may" with "must" and by adding the phrase "to the recipient, the CBCA, and FEMA" after arbitration. So, 206.206(b)(3)(iii)(B)(2) in the final rule says that the applicant must then submit a request for arbitration to the recipient, the CBCA, and FEMA within 30 calendar days from the date of the withdrawal of the pending appeal. FEMA wants to clarify that if an applicant withdraws a first appeal, then the applicant must submit a request for arbitration within 30 calendar days. If the applicant does not follow the requirements of 206.206(b)(3)(iii)(B)(2), then the applicant's request for arbitration will be denied for timeliness.

#### *I. Simultaneously Provide Decisions to Applicants & Recipients*

The State DEM [FEMA-2019-0012-0008] commented that it agrees with electronic submission to ease in tracking and ensuring timely receipt of appeals, and suggested FEMA also provide its decisions electronically to both the applicant and

recipient simultaneously. This is the course of action that FEMA proposed in the NPRM's 206.206(b)(1)(iii); therefore, FEMA did not make any changes to the regulatory text as a result of this comment.

*J. FEMA Exceeds 90-day Deadline*

A State DEM [FEMA-2019-0012-0008] commented that in both paragraphs 206.206(b)(1)(ii)(C) and (b)(2)(ii)(C) of the NPRM, FEMA allows itself 90 days from *receipt* of the appeal, rather than the date of the appeal itself, to respond per Section 423(b) of the Stafford Act. The State DEM further suggests regulatory text changes imposing penalties for any response beyond the 90-day deadline.

First and foremost, the date an applicant makes an appeal is not the same date FEMA receives the appeal because it must first pass through the recipient. In addition, though FEMA endeavors to render all appeals decisions within 90 days, it is an agile agency with emergent responsibilities. Nevertheless, FEMA remains stewards of Federal monies and must perform a thorough review to ensure grants follow the law. This constant conflict demands an ongoing shift of resources and priorities. With the final rule's implementation of electronic transmission, FEMA determinations should be received electronically when issued. The Regional Administrator will provide electronic notice of the disposition of the appeal to the applicant and the recipient thereby avoiding delays inherent in methods such as carrier delivery. FEMA will know the date received as it will be the same as the electronic transmission date. Lastly, FEMA notes that, pursuant to Section 423(d) of the Stafford Act, if the agency fails to respond to an applicant's first appeal within 180 days, said applicant may choose to arbitrate the dispute provided they meet all the other arbitration threshold requirements. Consequently, FEMA did not make any changes to the regulatory text at 206.206(b)(1)(ii)(C) and (b)(2)(ii)(C) as a result of the comments.

*K. 90-day Deadline for Technical Information*



Proposed paragraphs 206.206(b)(1)(iii) and (b)(2)(iii) provide that, for highly technical matters, the Regional Administrator may submit the appeal to an independent scientific or technical person/group having expertise in the subject matter of the appeal for advice or recommendation. The period of this review may be in addition to other allotted time periods.

In lieu of the above, a State DEM [FEMA-2019-0012-0008] commented that FEMA does not have the authority to expand the time it has to render a determination on a first or second appeal. Moreover, the State DEM argued, the time taken to seek technical advice should be deducted from FEMA's allotted 90 days, as FEMA should have already conducted a proper full technical review prior to making a final agency determination.

FEMA, as the steward of Federal monies, must always pursue the public's best interest by ensuring that all grants follow the law. For highly technical matters, the Agency has a responsibility to seek outside guidance if it lacks the requisite expertise inhouse. This will allow the Agency to make the correct decision and serve the greater good of distributing equitable disaster assistance. Moreover, pursuant to Section 423(d) of the Stafford Act, if FEMA fails to respond to an applicant's first appeal within 180 days, said applicant may choose to arbitrate the dispute provided they meet all the other arbitration threshold requirements. For these reasons, FEMA did not alter the regulatory text at 206.206(b)(1)(iii) and (b)(2)(iii) as a result of the comments.

*L. 30 Days to Provide Additional Information*

In the NPRM, under paragraphs 206.206(b)(1)(ii)(B) and (b)(2)(ii)(B), FEMA proposed allowing the recipient only 30-calendar days to provide any additional information to the Regional Administrator; instead of having the Regional Administrator include the date by which the information must be provided. Quantifying the period for

additional information better allows FEMA to issue timely determinations on first and second appeals.

A member of the public [FEMA-2019-0012-0003] commented that the proposed change allows an appellant to provide additional information even 30 days after the appeal submittal. This change would not serve the public's interest of FEMA issuing timely determinations on first appeal she argued. In this instance, FEMA would be required to delay its adjudication by 30 days while it waits for the window of opportunity to submit additional information on a first appeal to pass. Thus, if this change was implemented, an appellant would have 150 days to make a complete appeal. While the member of the public [FEMA-2019-0012-0003] is correct that the new 30-day deadline may add to the appeals timeline, it could also shorten the timeline of future appeals by quantifying the deadline. FEMA intends to provide a fair deadline for additional information. Therefore, FEMA did not make any changes to the regulatory text at 206.206(b)(1)(ii)(B) and (b)(2)(ii)(B) as a result of the comment.

*M. Untimeliness and Imposition of Penalties Upon FEMA*

The State DEM [FEMA-2019-0012-0008] proposed the imposition of penalties on FEMA when it exceeds the 90-day deadline for requesting additional information for both first and second appeals. This commenter also suggested that if FEMA misses its deadline, recipients and applicants should not be held to their deadlines, and FEMA should be barred from requesting information to substantiate timeliness. The State DEM also proposed a requirement for FEMA to provide monthly status updates concerning each appeal to the applicant and recipient. As noted above, the Stafford Act does not include any remedies or corrective actions in the event that FEMA fails to meet the 90-day deadline to decide appeals. However, FEMA has a public assistance second appeals tracker available to the public at <https://www.fema.gov/about/openfema/data-sets/fema-public-assistance-second-appeals-tracker>.

With regards to the State DEM's [FEMA-2019-0012-0008] suggestion that untimeliness on FEMA's part should relieve applicants and recipients from complying with their own deadlines. Section 423 of the Stafford Act requires an applicant to submit an appeal within 60 days; FEMA does not have the authority to alter or ignore this requirement. FEMA does have a duty to be a responsible steward of public monies and must therefore conduct a thorough review of all grants to ensure compliance with the law, even if that review happens to exceed the 90-day deadline provided for disposition of appeals. Finally, FEMA will not impose additional responsibilities upon itself, such as status updates, outside of what is prescribed by law. Consequently, FEMA did not make any changes to the regulatory text as a result of the comment.

#### *N. Implementation*

A State DEM [FEMA-2019-0012-0008] commented that 206.206(b)(1)(v) and (b)(2)(v) do not have deadlines or timelines for implementing a successful appeal. The State DEM suggested that FEMA adopt an actual deadline to avoid delaying project development without explanation to the applicant or recipient. The State DEM suggested language stating that if the Regional Administrator grants an appeal, FEMA must begin implementing the action within 30 days of the determination date, or at a minimum, provide the applicants and recipient with a status update indicating when the action would be implemented. In a separate comment, the agency also suggested requiring the Assistant Administrator for the Recovery Directorate to perform this action regarding second appeals.

FEMA finds the proposed language to be unnecessary because it effectively requires FEMA to impose requirements on itself not otherwise imposed by Congress. FEMA trusts the discretion of its Regional Administrators<sup>7</sup> to make appropriate decisions

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<sup>7</sup> The Assistant Administrator for the Recovery Directorate will direct the Regional Administrator to take appropriate implementing action(s) regarding successful second appeals.

on addressing successful appeals. Also, providing status updates would unintendedly affect FEMA's ability to meet timelines for other actions. Therefore, FEMA did not make any changes to the regulatory text at 206.206(b)(1)(v) and (b)(2)(v) as a result of the comment.

*O. Content of Arbitration Request*

A State DEM [FEMA-2019-0012-0008] commented on 206.206(b)(3)(iii)(C), which states that a request for arbitration must contain a written statement that specifies the amount in dispute, all documentation supporting the position of the applicant, the disaster number, and the name and address of the applicant's authorized representative or counsel. Additional supplemental documentation is permitted as ordered by the CBCA.

The State DEM believed the language was confusing because "all documentation" implied applicants could not submit supplemental information within a request for arbitration. The State DEM suggested removing the word "all" and adding language to allow supplemental documentation as requested by the CBCA. FEMA notes that the CBCA already has rules on supplemental materials located at 48 CFR 6106.608, Evidence; timing [Rule 608]. Accordingly, FEMA did not make any changes to the regulatory text at 206.206(b)(3)(iii)(C) as a result of the comment.

*P. Emergency versus Major Disaster Declaration Determinations*

As mentioned before, the State DEM [FEMA-2019-0012-0008] submitted an emergency declaration determination as their second and third attachment to their comment related to timeliness of appeals. In the third attachment, FEMA cites to 44 CFR 206.206 for the authority to appeal this emergency declaration determination. During the course of adjudicating this comment, FEMA reviewed how the NPRM discussed emergency versus major disaster determinations.

In the NPRM, FEMA limited arbitrations to major disaster declaration determinations at proposed 206.206(b)(3)(i)(A) since the right of arbitration is housed in

paragraph (d) of Section 423 of the Stafford Act. Section 423 is under Title IV of the Stafford Act, which is entitled “Major Disaster Assistance Programs.” Also, subparagraph (d)(5)(A) of 423 of the Stafford Act states that the applicant shall submit to the arbitration process established under the authority granted under Section 601 of Public Law 111-5. FEMA’s corresponding regulations under 206.209 are entitled “Arbitration for Public Assistance determinations related to Hurricanes Katrina and Rita (Major disaster declarations DR-1603, DR-1604, DR-1605, DR-1606, and DR-1607).” Therefore, FEMA limited arbitration in the NPRM to major disaster declarations.

Yet, there was no corresponding limitation in the appeals section of the NPRM because applicants may appeal emergency declaration decisions. As a result of the deliberation surrounding a response to this comment, FEMA did discover that the NPRM imprecisely stated in the Executive Orders 12866 and 13563 section that “[t]his proposed rule does not apply to emergency disaster declarations.” Rather, it should have stated that “[t]he Regulatory Evaluation does not include a discussion of emergency disaster declarations; since, arbitration is only available to dispute the determinations of major disaster declarations.” There was no need to analyze the cost for applicants to appeal determinations of emergency disaster declarations in the NPRM, since FEMA currently allows for such and the NPRM did not limit appeals to major disaster declaration determinations. FEMA did not make any changes to the regulatory text at 206.206 as a result of this comment but it did update the Regulatory Evaluation as noted above.

### **III. Summary of Other Changes**

The NPRM at 44 CFR 206.206(a) proposed to define the term “urbanized area” to mean the area as identified by the United States Census Bureau (USCB). The USCB defines an “urbanized area” as an area that consists of densely settled territory that contains 50,000 or more people. For clarity and to comply with publication requirements found in 1 CFR chapter I, FEMA has revised the final rule’s definition of

“urbanized area” as an area that consists of densely settled territory that contains 50,000 or more people.

FEMA realized that the NPRM at 206.206 was silent regarding the recipient-related first and second appeal time limits. Section 423(a) of the Stafford Act allows appeals within 60 days. Therefore, in the first appeal time limits portion of the final rule FEMA aligned with this requirement by adding the following sentence at the end of 206.206(b)(1)(ii)(A): a recipient may make a recipient-related first appeal within 60 calendar days from the date of the FEMA determination that is the subject of the appeal and must electronically submit their first appeal to the Regional Administrator. FEMA also had to make a corresponding addition to the second appeal time limits portion of the final rule by adding the following sentence to the end of 206.206(b)(2)(ii)(A): if the Regional Administrator denies a recipient-related first appeal in whole or in part, the recipient may make a recipient-related second appeal within 60 calendar days from the date of the Regional Administrator’s first appeal decision and the recipient must electronically submit their second appeal to the Assistant Administrator for the Recovery Directorate.

FEMA realized that the NPRM at 206.206(b)(3)(i)(A) does not follow the language of Section 423(d)(1) of the Stafford Act, which says that an applicant for assistance may request arbitration to dispute the eligibility for assistance or repayment of assistance. Rather, the NPRM at 206.206(b)(3)(i)(A) states that an applicant may request arbitration if there is a disputed agency determination. Therefore, in the final rule FEMA is removing the phrase “disputed agency determination” from paragraph 206.206(b)(3)(i)(A) and adding “dispute of the eligibility for assistance or of the repayment of assistance” in its place.

FEMA also realized that the NPRM at 206.206(b) does not follow the language of Section 423 of the Stafford Act, which says that an applicant for assistance may request

arbitration to dispute the eligibility for assistance or repayment of assistance. Rather, the NPRM at 206.206(b) says that an eligible applicant or recipient may appeal or an eligible applicant may arbitrate any determination previously made related to an application for or the provision of PA according to the procedures of this section. Because the regulatory text does not follow the statutory language, FEMA is removing the phrase “or an eligible applicant may arbitrate” from 206.206(b) and FEMA is adding a second sentence to 206.206(b) that says: “An eligible applicant may request arbitration to dispute the eligibility for assistance or repayment of assistance.”

FEMA is making these technical changes because FEMA does not have the discretion to deviate from statutorily imposed restrictions. Section 423(a) of the Stafford Act allows an applicant to appeal any decision regarding eligibility for, from, or amount of assistance. Whereas, Section 423(d)(1) of the Stafford Act allows an applicant to arbitrate the eligibility for assistance or repayment of assistance. Since Congress did not use the same language, there is a difference between what an applicant can arbitrate and what an applicant can appeal, which FEMA must delineate in its regulations at 44 CFR 206.206. Since these requirements are statutorily imposed and FEMA has no discretion FEMA may make these edits as technical changes in the final rule.

Additional technical changes to the final rule are at 44 CFR 206.206(b)(1)(iv)(B)(*1*) and (b)(2)(iv)(B)(*1*) as the Office of Management and Budget (OMB) revised the cross references from 2 CFR 200.338 to 2 CFR 200.339; as, OMB revised sections of their Guidance for Grants and Agreements. (See 85 FR 49506, Aug. 13, 2020.)

The final rule also includes corrections of typographical errors and other non-substantive stylistic changes from the NPRM. FEMA made a typographical error under the Executive Orders 12866 and 13563 section Impartiality heading. In the NPRM, the Executive Orders 12866 and 13563 section stated that CBCA found in favor of the

applicant fully or partially in less than 20 percent of the time. The “20 percent” was a typographical error. It should have read “55 percent” to align with the correct data, which was listed on Table 13 of the NPRM. In this final rule, the data for the Executive Orders 12866 and 13563 section has been updated with the most recent 10-years of available data at the time of the analysis. Therefore, FEMA has replaced “less than 20” with “about 13” in the final rule to make sure that the narrative of the percentage that the CBCA found in favor of the applicant fully or partially aligns with Table 13.

The final rule also includes other non-substantive changes from the NPRM. For instance, FEMA added a footnote to the Executive Orders 12866 and 13563 section under the Cost to Government/FEMA heading that “FEMA estimates that we could need up to four expert witnesses. FEMA’s expert witnesses may or may not speak at the hearing. Additionally, FEMA may hire an expert witness so that FEMA can consult with them about the subject matter.” The footnote adds clarity to the statement that FEMA assumes that it would use four expert witnesses per case. This change is for clarification purposes only.

In this final rule, FEMA added onto footnote 11 in the Executive Orders 12866 and 13563 section under the first bullet point under the Assumptions heading that “[i]n the final rule, the data for the Executive Orders 12866 and 13563 section has been updated with the most recently available data at the time of the analysis.” The edits to footnote 11 clarifies that the Executive Orders 12866 and 13563 section contains the most recent data at the time of the analysis and that the figures will be in the most recent dollars. For the NPRM, 2018 dollars were used based off the Bureau of Labor Statistics (BLS) Consumer Price Index (CPI) data. In the final rule, 2019 dollars were used based off the BLS CPI data as it became available. This addition is for clarification purposes only.



Another non-substantive stylistic change from the NPRM was made to the definition of “applicant” and “recipient” in 206.206(a). Instead of saying that the “applicant” or the “recipient” “refers to,” the final rule regulatory text says that the “applicant” or the “recipient” “has the same meaning as.” So, the definitions in the final rule regulatory text are: *Applicant* has the same meaning as the definition at § 206.201(a) and *Recipient* has the same meaning as the definition at § 206.201(m).

The final non-substantive stylistic and grammar changes from the NPRM were made to 206.206(c) in the final rule. First, FEMA split the paragraph into two subparagraphs based on whether the subparagraph dealt with the finality of a FEMA decision or a CBCA decision. Then, FEMA corrected a grammar error in the first sentence of 206.206(c)(1) by revising “constitute” to “constitutes.” Since, FEMA split paragraph 206.206(c) from the NPRM into two subparagraphs in the final rule, FEMA had to include that final decisions are not subject to further administrative review in both subparagraphs, as it applies to the finality of both FEMA and CBCA decisions.

#### **IV. Regulatory and Statutory Analyses**

##### *A. Executive Order 12866, as amended, Regulatory Planning and Review and Executive Order 13563, Improving Regulation and Regulatory Review*

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

OMB has designated this rule as a non-significant regulatory action, under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it.

## **Need for Regulatory Action**

When FEMA determines that an applicant or recipient is ineligible for PA funding, or if the applicant or recipient disputes the amount awarded, FEMA has implemented a process to appeal the decision. First, the applicant or recipient can appeal to the FEMA Regional Administrator (RA), who will make a determination on the appeal. If the applicant or recipient does not submit a second appeal of the RA's determination, the result of the first appeal is the final agency determination. If the applicant or recipient is not satisfied with the result of the first appeal, they can submit a second appeal to the FEMA Assistant Administrator for the Recovery Directorate. The result of the second appeal is a final decision of FEMA.

This rule implements provisions for arbitration in lieu of a second appeal, or in cases where an applicant has had a first appeal pending with FEMA for more than 180 calendar days. Applicants choosing arbitration would have their case heard by a panel of judges with the CBCA. A decision by the majority of the CBCA panel constitutes a final decision that would be binding on all parties. Final decisions would not be subject to further administrative review.

Pursuant to 42 U.S.C. 5189a, as amended by Section 1219 of the DRRRA, to request arbitration, an applicant (1) must have a dispute arising from a disaster declared after January 1, 2016; (2) must be disputing an amount that exceeds \$500,000 (or \$100,000 for an applicant in a "rural area" with a population of less than 200,000 and outside of an urbanized area); and, (3) must have submitted a first appeal and has either received a denial of the first appeal or has not received a decision after 180 calendar days.

This final rule will directly affect applicants or recipients disputing FEMA PA eligibility determinations or disputing the amount awarded for PA projects. Applicants

are required to submit appeals through their State, or in the case of a Tribal declaration,<sup>8</sup> their Tribal government (recipients). The recipient will then forward the request to the FEMA Regional Administrator, along with a recommendation for a first appeal.

If an applicant has not received a decision on their first appeal after 180 days and meets the other two previously-outlined criteria, they may withdraw the first appeal and request arbitration. Alternatively, if the applicant does not agree with the Regional Administrator's decision on the first appeal, they may either submit a second appeal to the FEMA Assistant Administrator for the Recovery Directorate or request arbitration. A panel of judges with the CBCA would hear any arbitration cases. The applicant would send a representative and possibly expert witnesses to the arbitration hearing. The recipient would also send a representative to support the applicant. FEMA representatives and expert witnesses would also attend the hearing to defend FEMA's determination in the case of an applicant not receiving the first appeal decision within 180 days or to defend FEMA's first appeal decision.

The final rule will codify regulations for the arbitration process as directed by 42 U.S.C. 5189a(d)(5). Applicants are eligible for arbitration for disputes arising from major disasters declared on or after January 1, 2016. This process is already available, and eligible applicants have been notified of this option.<sup>9</sup>

As amended by Section 1219 of the DRRRA, 42 U.S.C. 5189a(d) names the CBCA as the entity responsible for conducting these arbitrations. The CBCA has promulgated

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<sup>8</sup> Tribes may choose to apply for PA independently as a recipient (tribal declaration) or may submit through their State as a subrecipient.

<sup>9</sup> On December 18, 2018, FEMA implemented section 1219 of DRRRA by posting a Fact Sheet on its website. After CBCA published their March 5, 2019 proposed rule, see 84 FR 7861, FEMA updated the: Section 1219 Public Assistance Appeals and Arbitration Fact Sheet (3-27-19). After CBCA finalized their rule on June 21, 2019, see 84 FR 29085, FEMA again updated the Fact Sheet. The current Fact Sheet can be found at: [https://www.fema.gov/sites/default/files/2020-07/fema\\_DRRRA-1219-public-assistance-arbitration-right\\_fact-sheet.pdf](https://www.fema.gov/sites/default/files/2020-07/fema_DRRRA-1219-public-assistance-arbitration-right_fact-sheet.pdf). (2-20). Accessed June 8, 2021.

regulations at 48 CFR Part 6106 establishing its arbitration procedures for such purpose.<sup>10</sup>

This final rule establishes a 60-calendar day deadline for submitting requests for arbitration (§ 206.206(b)(3)(iii)(B)) so that submission time limits for second appeals and arbitrations are the same. FEMA believes that there should be consistency between the time to request arbitration and the time to submit second appeals for administrative ease and to reduce potential confusion amongst applicants.

### **Affected Population**

The final rule will affect disputes from PA applicants arising from major disaster declarations. Specifically, applicants that (1) submitted a first appeal and received a negative decision, or, (2) have a first appeal pending for more than 180 days and wish to withdraw the appeal in favor of arbitration. Applicants may only request arbitration for disputes in excess of \$500,000, or \$100,000 in rural areas, and for disputes that arise from major disasters declared on or after January 1, 2016.

### **Summary of Regulatory Changes**

FEMA is revising its PA appeals regulation at 44 CFR 206.206 to add in the new right to arbitration under DRRRA, in conjunction with some revisions to the appeals process. DRRRA added arbitration as a permanent alternative to a second appeal under the PA Program, or for applicants that have had a first appeal pending with FEMA for more than 180 calendar days that may withdraw such appeal and submit a request for arbitration, provided the dispute is in excess of \$500,000, or \$100,000 in rural areas, and for disputes that arise from major disasters declared on or after January 1, 2016. The other major revisions to 44 CFR 206.206 include adding definitions; adding subparagraphs to clarify what actions FEMA may take and will not take while an appeal

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<sup>10</sup> 48 CFR Part 6101, Rules of Procedure of the Civilian Board of Contract Appeals, also covers PA arbitrations.

is pending and state that FEMA may issue separate guidance as necessary, similar to current 44 CFR 206.209(m); adding a finality of decision paragraph; requiring electronic submission for appeals and arbitrations documents; and clarifying overall time limits for first and second appeals.

In the final rule, a non-substantive stylistic change from the NPRM was made to the definition of “applicant” and “recipient” in § 206.206(a). Instead of saying that the “applicant” or the “recipient” “refers to,” the final rule regulatory text says that the “applicant” or the “recipient” “has the same meaning as.” So, the definitions in the final rule regulatory text are: *Applicant* has the same meaning as the definition at § 206.201(a) and *Recipient* has the same meaning as the definition at § 206.201(m).

In this final rule, FEMA is adding a definition of *Regional Administrator* and making changes to the regulatory text regarding first appeals and second appeals at § 206.206(b)(1)(ii)(A) and (b)(2)(ii)(A) as a result of the 60-day appeals deadline comments.

Additionally, in this final rule, FEMA is making technical revisions at §§ 206.206(b) and 206.206(b)(3)(i)(A) to align the regulatory text with the dispute of the eligibility for assistance or repayment of assistance language of Section 423(d)(1) of the Stafford Act.

FEMA realized that the NPRM at § 206.206 was silent regarding the recipient-related first and second appeal time limits. Section 423(a) of the Stafford Act allows appeals within 60 days. Therefore, in the first appeal time limits portion of the final rule FEMA aligned with this requirement by adding the following sentence at the end of § 206.206(b)(1)(ii)(A): a recipient may make a recipient-related first appeal within 60 calendar days from the date of the FEMA determination that is the subject of the appeal and must electronically submit their first appeal to the Regional Administrator. FEMA also had to make a corresponding addition to the second appeal time limits portion of the

final rule by adding the following sentence to the end of § 206.206(b)(2)(ii)(A): if the Regional Administrator denies a recipient-related first appeal in whole or in part, the recipient may make a recipient-related second appeal within 60 calendar days from the date of the Regional Administrator's first appeal decision and the recipient must electronically submit their second appeal to the Assistant Administrator for the Recovery Directorate. This regulatory change is not expected to have a significant economic impact.

FEMA provided clarifying edits to § 206.206(b)(3)(iii)(B)(2) in the final rule, so that an applicant understands that if they choose arbitration pursuant to Section 423(d) of the Stafford Act, as FEMA has not responded to an applicant's first appeal within 180 days, then they must withdraw the pending appeal before they file the request for arbitration. Basically, the applicant cannot arbitrate and appeal at the same time. Plus, FEMA provided clarifying edits to § 206.206(b)(3)(iii)(B)(2) to remove the phrase "and the CBCA." FEMA deleted this phrase, as a pending first appeal would not be pending before the CBCA, so the applicant would have no reason to notify the CBCA of the first appeal withdrawal.

For clarity and to comply with publication requirements found in 1 CFR chapter I, FEMA has revised the final rule's definition of "urbanized area" as an area that consists of densely settled territory that contains 50,000 or more people.

Additional technical changes to the final rule are at 44 CFR 206.206(b)(1)(iv)(B)(1) and (b)(2)(iv)(B)(1) as the Office of Management and Budget (OMB) revised the cross references from 2 CFR 200.338 to 2 CFR 200.339; as, OMB revised sections of their Guidance for Grants and Agreements. (See 85 FR 49506, Aug. 13, 2020.)

So in the final rule, FEMA has split the first sentence of § 206.206(b)(3)(iii)(B)(2) into two sentences that say if the first appeal was timely submitted, and the Regional

Administrator has not rendered a decision within 180 calendar days of receiving the appeal, an applicant may arbitrate the decision of FEMA. To request arbitration, the applicant must first electronically submit a withdrawal of the pending appeal simultaneously to the recipient and the FEMA Regional Administrator. This regulatory change will not have an economic impact.

FEMA also added clarifying language to the last sentence of § 206.206(b)(3)(iii)(B)(2) by replacing “may” with “must” and by adding the phrase “to the recipient, the CBCA, and FEMA” after arbitration. So, § 206.206(b)(3)(iii)(B)(2) in the final rule says that the applicant must then submit a request for arbitration to the recipient, the CBCA, and FEMA within 30 calendar days from the date of the withdrawal of the pending appeal. FEMA wants to clarify that if an applicant withdraws a first appeal, then the applicant must submit a request for arbitration within 30 calendar days. If the applicant does not follow the requirements of § 206.206(b)(3)(iii)(B)(2), then the applicant’s request for arbitration will be denied for timeliness. This regulatory change will not have an economic impact.

The final non-substantive stylistic and grammar changes from the NPRM were made to § 206.206(c) in the final rule. First, FEMA split the paragraph into two subparagraphs based on whether it dealt with the finality of a FEMA decision or a CBCA decision. Then, FEMA corrected a grammar error in the first sentence of § 206.206(c)(1) by revising “constitute” to “constitutes.” Since, FEMA split paragraph 206.206(c) from the NPRM into two subparagraphs in the final rule, FEMA had to include that final decisions are not subject to further administrative review in both subparagraphs, as it applies to the finality of both FEMA and CBCA decisions.

### **Assumptions**

This analysis used the following assumptions:

- All monetary values are presented in 2019 dollars. FEMA used the Bureau of Labor Statistics (BLS) Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, all items, by month, Annual Average as published December 2019.<sup>11</sup>
- This analysis does not include a discussion of emergency disaster declarations; since, arbitration is only available to dispute the determinations of major disaster declarations.<sup>12</sup>
- FEMA assumed the length of time for an arbitration case is based on the hearing location.
- FEMA used 2019 wage rates for all parties involved in arbitration cases.

## **Baseline**

Following guidance in OMB Circular A-4, FEMA assessed the impacts of this final rule against a pre-statutory baseline. The pre-statutory baseline is an assessment of what the world would look like if the relevant statute(s) had not been adopted. In this instance, FEMA has been accepting arbitration cases since the implementation of DRRA, and retroactive to January 1, 2016. Since the statute has already been implemented and because this rule is not making additional substantive changes, the rule has no cost or benefits related to the new right of arbitration under a no-action baseline. The costs, benefits, and transfers of this rule are measured against the pre-statutory baseline. The benefit of this rule is making information publicly available in the CFR for transparency and to prevent any confusion on the most up-to-date arbitration process.

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<sup>11</sup> Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, all items, by month. Bureau of Labor Statistics: Consumer Price Index 2019. Accessed October 23, 2020. <https://www.bls.gov/cpi/tables/supplemental-files/archive-2019.zip>. In the final rule, the data for the Executive Orders 12866 and 13563 section has been updated with the most recently available data at the time of the analysis.

<sup>12</sup> The NPRM incorrectly stated in the Executive Orders 12866 and 13563 section that “[t]his proposed rule does not apply to emergency disaster declarations.” The NPRM should have stated that there was no need to the cost for applicants to appeal determinations of emergency disaster declarations because FEMA currently allows for such and the NPRM did **not** limit appeals to major disaster declaration determinations.



Currently, FEMA has no permanent regulations for arbitrations outside of Hurricanes Katrina and Rita. Since the passage of the DRRRA, certain PA applicants under declarations since January 1, 2016 may request arbitration pursuant to 42 U.S.C. 5189a(d). On June 21, 2019, CBCA published a final rule (see 84 FR 29085) and FEMA has published a corresponding fact sheet. Between January 1, 2016 and November 9, 2020, FEMA received 20 requests for arbitration.<sup>13</sup> Three of these cases are still in progress, so FEMA does not have available data on the outcome of these cases. Of the 17 closed cases, FEMA prevailed in 10 cases, the applicant prevailed in 4 cases, and the applicant withdrew from the arbitration process prior to a decision in 3 cases. These figures will change as FEMA continues to receive arbitration requests.

While arbitration is available for disaster declarations retroactive to January 1, 2016, the process did not become available to applicants until FEMA published guidance in December 2018, and FEMA did not begin receiving arbitration requests until March 7, 2019. This means that FEMA only has 19 months of historical data, and therefore, FEMA relied on older arbitration regulations as a proxy for the expected number of arbitration cases arising out of this final rule.

FEMA previously had regulations permitting arbitrations arising from disaster declarations for Superstorm Sandy. No applicants requested arbitration pursuant to these regulations. The authority for these arbitrations has sunset and FEMA has since removed the regulations. FEMA has regulations, at 44 CFR 206.209, permitting arbitrations arising from disaster declarations for Hurricanes Katrina and Rita. This regulation is only available for PA applicants under Hurricane Katrina and Rita disaster declarations. The number of arbitrations submitted under this authority and the process relied on to conduct these arbitrations provide insight to project the number of arbitration cases in this final

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<sup>13</sup> The number of arbitration requests was provided by FEMA's Office of Chief Counsel Disaster Disputes Branch as of November 9, 2020.

rule. While the Katrina/Rita arbitration regulations have some key differences from this final regulation, such as time frames and allowing applicants to request arbitration in lieu of first appeals, it is the best historical data that FEMA has available to estimate the number of expected arbitration cases for this final rule.

FEMA recognized that the regulations at 44 CFR 206.209 have a 30-day time limit for submitting arbitration requests; whereas, this final rule has a 60 calendar-day time limit for arbitrations. FEMA was not able to estimate the impact these additional 30 days may have on the number of arbitrations submitted.

### **Number of Potential Arbitration Cases**

In addition to reviewing the limited historical data available on the 20 arbitration cases, FEMA also examined the number of arbitrations submitted from the Hurricane Katrina and Rita disasters pursuant to 44 CFR 206.209, in lieu of filing a first appeal, from 2010 through 2019 to derive an estimate of the number of arbitration cases that applicants might submit per year pursuant to 42 U.S.C. 5189a(d). Pursuant to 42 U.S.C. 5189(d)(5)(A), arbitrations authorized by the DRRRA must follow the process established in 44 CFR 206.209 for Katrina and Rita arbitrations, so FEMA relied on the annual average percentage of cases submitted under this regulation as a basis for estimating the number of cases that would arise for this final rule. This analysis was conducted using data from 2010 through 2019.<sup>14</sup> Applicants could arbitrate in lieu of a first appeal only if the amount of the project was greater than \$500,000.<sup>15</sup> During this period, applicants

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<sup>14</sup> The proposed rule stated that “The authority to arbitrate in lieu of a filing a first appeal for Hurricanes Katrina and Rita became available in February 2009 and 2017 is the latest calendar year where complete data was available at the time of this analysis.” Review under the Executive Orders 12866 and 13563 section in the proposed rule was conducted with data available at the time. FEMA typically uses 10 years of historical data for their analysis. However, 10 years of historical data was not available at the time of the analysis of the proposed rule. For this final rule, FEMA was able to use 10 years of historical data, 2010 through 2019. Hurricane Katrina and Rita occurred in 2005. FEMA notes that as time passes, fewer applicants are submitting requests for public assistance each year, as over 15 years has passed since the Katrina/Rita declarations.

<sup>15</sup> Please note that arbitration cases for Hurricanes Katrina and Rita are not bound by a threshold for rural areas as is this rule. FEMA does not know if this limitation will result in more or less cases submitted.

submitted a total of 73 arbitrations and a total 225 first appeals.<sup>16</sup> From this available data, applicants chose arbitration in lieu of a first appeal 32 percent of the time  $((73 \div 225) \times 100 = \text{approximately } 32 \text{ percent})$ .

Pursuant to 42 U.S.C. 5189(d)(5)(B), arbitration is authorized by the DRRRA in lieu of a second appeal where the dispute is more \$500,000, or \$100,000 for rural areas. For second appeals estimates, FEMA looked at all PA appeals from 2010 through 2019, rather than just the appeals resulting from Hurricanes Katrina and Rita since a second appeal was available to all applicants. FEMA found that there were 874 second appeals submitted.<sup>17</sup> Of that total, FEMA had data on the amount in dispute for 751 appeals. FEMA applied the urban/rural and minimum project amount requirements to these appeals and found that 353 or 47 percent would have been eligible for arbitration under this final rule  $((353 \div 751) \times 100 = \text{approximately } 47 \text{ percent})$ .<sup>18</sup>

FEMA used the number of second appeals by year, then applied the percent eligible for arbitration under the final rule of 47 percent, then applied the percent choosing arbitration in lieu of a first appeal of 32 percent to calculate the expected number of arbitration cases from 2010 to 2019 as shown in Table 1.

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<sup>16</sup> Data on appeals and arbitrations is provided by FEMA's Office of Chief Counsel Disaster Disputes Branch. Not all these first appeals would have been eligible for arbitration. To be eligible for arbitration, the amount in dispute would have had to have been greater than \$500,000. FEMA does not have amount in dispute data available for these cases, so the arbitration percentage may be overstated.

<sup>17</sup> During the period of 2010-2019, 874 second level appeals were submitted. FEMA has amount in dispute data for 751 cases. FEMA does not have the amount in dispute data on the 123 cases because FEMA did not maintain electronic records for appeals prior to 2015. Prior to 2015, this data was manually entered into a database with many fields left blank.

<sup>18</sup> Out of 751 cases, 258 had an amount in dispute greater than \$500,000 and would be eligible regardless of the urban/rural classification. 288 cases were for amounts between \$100,000 and \$500,000, of which 95 were classified as rural. 353  $(= 258 + 95)$  cases out of 751, or 47 percent would have met the eligibility requirements for arbitration in lieu of a second appeal.

**Table 1. Total and Annual Average Estimated Arbitration Cases per Year**

<b>CY</b>	<b>Number of Second Appeals</b>	<b>Percent Eligible under Final Rule</b>	<b>Percent choosing Arbitration</b>	<b>Expected Number of Arbitration Cases</b>
2010	93	47%	32%	14
2011	107	47%	32%	16
2012	92	47%	32%	14
2013	102	47%	32%	15
2014	82	47%	32%	12
2015	43	47%	32%	6
2016	83	47%	32%	12
2017	76	47%	32%	11
2018	110	47%	32%	17
2019	86	47%	32%	13
Total	874			130
Average	87			13

Based on historical data from 2010 through 2019 and case data from 44 CFR 206.209, FEMA estimates that there would be an average of 13 arbitration cases in lieu of a second appeal per year under the final rule.

Arbitration has been available under 42 U.S.C. 5189a(d)(5) since January 1, 2016. So far, 20 cases were submitted, with three submitted for a first appeal lasting more than 180 days. Based on this limited data, FEMA estimates that 15 percent of arbitration cases would result from a withdrawal of a first appeal.<sup>19</sup> Applying the 15 percent arbitration rate to the annual average number of expected arbitration cases would result in two additional arbitration case per year (15 percent x 13 cases = 1.95, rounded to two cases). Therefore, FEMA estimates an average of 15 arbitration cases per year (13 + 2 = 15 arbitrations per year).

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<sup>19</sup> Calculation: (3 cases where a first appeal lasted more than 180 days ÷ 20 arbitration cases) x 100= 15 percent.

In this final rule, FEMA is removing the phrase “or an eligible applicant may arbitrate” from “206.206(b) and FEMA added a second sentence to 206.206(b) that says: “[a]n eligible applicant may request arbitration to dispute the eligibility for assistance or repayment of assistance” so that it follows the Stafford Act. This change in this final rule will not impact the number of arbitration cases per year since applicants can still request to arbitrate the case. However, the results of the arbitration may be impacted by the change in language. FEMA further discusses this point in our transfers and uncertainty analysis sections.

### **Costs**

Based on experience from the arbitrations conducted for Hurricanes Katrina and Rita, costs from this final rule would arise mainly from travel expenses; opportunity costs of time for the applicant and applicant’s representatives, recipient’s representatives, and FEMA’s representatives; and contract costs for applicants and FEMA to retain legal counsel and experts. Cost estimates are based on the expected number of arbitration cases per year. Since FEMA does not reimburse for applicant arbitration expenses, FEMA does not have data on the expenses incurred by applicants who have arbitrated from Hurricanes Katrina and Rita to serve as a proxy for this final rule. Other provisions of the final rule, such as timeframe requirements, electronic filing requirements, technical advice and clarifications would not have associated costs. FEMA does not expect the electronic filing requirement to have associated costs since nearly all applicants have access to internet and email, and most submit arbitration requests through their attorneys. The final timeframe requirements would align the submission deadlines for arbitration and appeals and would not place additional burdens on the applicants. FEMA currently provides technical advice as needed, so this would not be a new practice under this final rule.

The arbitration process is highly customizable for the applicant. The applicant may choose to use an attorney, or several attorneys to represent them during the arbitration process. The applicant may also choose not to hire legal representation at all. Additionally, the applicant may use any number of expert witnesses or none. Because of the variability in the way arbitrations are conducted, FEMA is presenting what it considers a typical case upon which to base its cost estimates. This “typical case” is based on recent experience with the 20 arbitration cases already filed. Generally, the applicant will use one or two attorneys and at least one expert witness. However, the arbitration process is extremely flexible, and an applicant can use whatever resources it thinks would be most appropriate for its case. For example, in one case, the applicant hired several non-local attorneys for representation. In another case, the arbitration was conducted via written reports only, and no hearing was conducted.

Costs to the CBCA are not discussed in this analysis. CBCA promulgated their own regulations regarding their procedures for FEMA arbitration cases. Under DRRA, CBCA will be responsible for covering the costs of conducting arbitration hearings. All other parties including the applicant, the recipient, and FEMA would be responsible for covering their own expenses. The final rule does not mandate any costs for the applicant or recipient. The arbitration process would be entirely voluntary on the part of the applicant. Applicants would choose to request arbitration if they determine that the cost of arbitration is justified by the potential benefits.

This analysis estimates a range of potential costs based on the applicant’s or recipient’s use of attorneys for representation. The final rule would not require attorneys to represent any party for arbitration. However, FEMA would be represented by attorneys at any arbitration hearing.

The costs to the applicant, recipient, and FEMA would be due to travel and opportunity cost of time and contract costs for legal counsel and experts. To estimate the

opportunity cost of time, FEMA assumed that each case would take each party 46.5 hours (rounded to 47 hours) to prepare for the hearing, attend the hearing, and for post hearing work.<sup>20</sup> Hearings have historically lasted two working days, or 16 hours.<sup>21</sup> Additional time would be required for travel as is discussed later in this analysis. FEMA also assumes that each party would make use of expert witnesses in support of their case. Additionally, FEMA generally pays for a court reporter.

Regulations at 44 CFR 206.209 have a 30-day time limit for submitting arbitration requests; whereas, this final rule has a 60 calendar-day time limit for arbitrations. Since the 60 calendar-day appeals deadline is current FEMA policy there will be no additional costs for the regulatory text changes at § 206.206(b)(1)(ii)(A) and (b)(2)(ii)(A) since it has already been accounted for.

### **Opportunity Cost of Time and Wages**

A typical arbitration request requires the work of several people, including lawyers to represent the applicants, a court reporter to take a transcript of the hearing, and State, local, Tribal, or PNP managers who are responsible for compiling and submitting the original PA request. Applicants will also typically supply expert witnesses when making their case to the CBCA panel. FEMA used wage rates for General and Operations Managers to represent State, Tribal, local, and PNP managers. Many PA projects involve repair or replacement of buildings and infrastructure, so FEMA assumes that Engineers would be the most likely occupation used as expert witnesses.

FEMA used hourly wage rates from the Bureau of Labor Statistics Occupational Employment Statistics for the following occupations: \$69.86 for Lawyers (SOC 23-1011), \$31.25 for Court Reporters and Simultaneous Captioners (SOC 23-2093), \$48.45 for Engineers (SOC 17-2000), and \$59.15 for General and Operations Managers (SOC

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<sup>20</sup> Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

<sup>21</sup> Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

11-1021).<sup>22</sup> To account for the benefits paid by employers, FEMA used a wage multiplier of 1.46,<sup>23</sup> resulting in fully-loaded hourly wages of \$102.00 for Lawyers, \$45.63 for Court Reporters and Simultaneous Captioners, \$70.74 for Engineers, and \$86.36 for General and Operations Managers.

FEMA used the 2019 hourly wage tables for the Washington-Baltimore-Arlington, DC-MD-VA-WV-PA<sup>24</sup> locality rate for FEMA employees participating in arbitration cases. Based on current FEMA practice, FEMA assumes that GS-13 employees would perform both legal and other services for an arbitration case and the work would be reviewed by a manager at the GS-15 level. The hourly GS-13 Step 5 salary was \$53.85, and the hourly GS-15 step 5 salary was \$74.86. In order to account for the benefits paid by employers, FEMA used a 1.46 multiplier to calculate loaded wage rates of \$78.62 for a GS-13 Federal employee and \$109.30 for a GS-15 Federal employee.

## **Travel**

Arbitration cases are heard by a panel of judges of the CBCA, which is based in Washington, DC. The arbitration process is very customizable, so applicants can choose to have the hearings locally, where a CBCA judge would travel to their location, and FEMA would also send its representatives. Alternatively, cases could be heard at the CBCA, and the applicant would travel to Washington, DC, along with any lawyers and expert witnesses. Finally, the applicant could choose to have the CBCA review

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<sup>22</sup> U.S. Bureau of Labor Statistics. National Occupational Employment and Wage Estimates United States. May 2019. Accessed August 18, 2020. [https://www.bls.gov/oes/2019/may/oes\\_nat.htm](https://www.bls.gov/oes/2019/may/oes_nat.htm).

<sup>23</sup> Bureau of Labor Statistics, Employer Costs for Employee Compensation, Table 1. "Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, March 2019." Available at [http://www.bls.gov/news.release/archives/ecec\\_06182020.pdf](http://www.bls.gov/news.release/archives/ecec_06182020.pdf). Accessed August 18, 2020. The wage multiplier is calculated by dividing total compensation for all workers of \$37.73 by wages and salaries for all workers of \$25.91 per hour yielding a benefits multiplier of approximately 1.46.

<sup>24</sup> U.S. Office of Personnel Management. 2019 General Schedule (GS) Locality Pay Tables. August 19, 2020. [https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2019/DCB\\_h.pdf](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2019/DCB_h.pdf).



documents, and nobody would be required to travel. Because PA applicants are located throughout the U.S. and can be travelling from any location within the U.S., FEMA used average nationwide travel costs to estimate the travel costs for this rule.

The U.S. General Service Administration (GSA) provides guidance on travel policy, hotel rates, and meals and incidentals for Federal employees. FEMA used GSA data on hotel prices and per diem rates to estimate travel expense costs of attending a hearing in person.<sup>25</sup> Because data on travel expenses for non-Federal employees is not available, FEMA used the Federal lodging and per diem rates for applicants traveling to Washington, DC to attend hearings. According to GSA, in 2019, the average price of a hotel room in Washington, DC was \$216 per night<sup>26</sup> and outside of the Washington, DC metro area was \$94 per night.<sup>27</sup> The per diem rate for meals and incidentals on the first and last travel days<sup>28</sup> is \$57 and \$76 for other travel day(s) in Washington, DC. Similarly, the per diem rates for meals and incidentals on the first and last day is \$41 and \$55 for the other days outside of Washington, DC.<sup>29</sup>

The U.S. Department of Transportation (DOT) provides information on the price of domestic airfare.<sup>30</sup> According to the Bureau of Transportation Statistics, the annual

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<sup>25</sup>U.S. General Services Administration. “FY 2019 Per Diem Rates for District of Columbia.” Accessed on August 19, 2020. Standard CONUS rate used for lodging and MI&E. [https://www.gsa.gov/travel/plan-book/per-diem-rates/per-diem-rates-lookup/?action=perdiems\\_report&state=DC&fiscal\\_year=2019&zip=&city=](https://www.gsa.gov/travel/plan-book/per-diem-rates/per-diem-rates-lookup/?action=perdiems_report&state=DC&fiscal_year=2019&zip=&city=). Per diem rates are calendar year instead of fiscal year.

<sup>26</sup> FEMA took the average of the 12 month per diem lodging rates provided by GSA for Washington, DC from October 2018 to September 2019, available at [https://www.gsa.gov/travel/plan-book/per-diem-rates/per-diem-rates-lookup/?action=perdiems\\_report&state=DC&fiscal\\_year=2019&zip=&city=](https://www.gsa.gov/travel/plan-book/per-diem-rates/per-diem-rates-lookup/?action=perdiems_report&state=DC&fiscal_year=2019&zip=&city=).

<sup>27</sup> U.S. General Service Administration. “FY 2019 Per Diem Rates – Effective October 1, 2018.” Accessed on May 24, 2021. Standard CONUS rate used for lodging and MI&E. [https://www.gsa.gov/cdnstatic/FY2019\\_PerDiemRatesMasterFile\\_0.xls](https://www.gsa.gov/cdnstatic/FY2019_PerDiemRatesMasterFile_0.xls). Per diem rates are calendar year instead of fiscal year.

<sup>28</sup> U.S. General Services Administration. “M&IE Breakdown.” Accessed on May 24, 2021. <https://www.gsa.gov/travel/plan-book/per-diem-rates/mie-breakdown>. Per GSA, first and last travel days meals and incidentals expenses (M&IE) for the first and last calendar day of travel is calculated at 75 percent of the total M&IE.

<sup>29</sup> U.S. General Service Administration. “FY 2019 Per Diem Rates – Effective October 1, 2018.” Accessed on May 24, 2021. Standard CONUS rate used for lodging and MI&E. [https://www.gsa.gov/cdnstatic/FY2019\\_PerDiemRatesMasterFile\\_0.xls](https://www.gsa.gov/cdnstatic/FY2019_PerDiemRatesMasterFile_0.xls). Per diem rates are calendar year instead of fiscal year.

<sup>30</sup>Bureau of Transportation Statistics. “Annual Fares 1995-2019 4Q 2019” (.xlsx) March 23, 2020. U.S. Department of Transportation. <https://www.bts.gov/sites/bts.dot.gov/files/Annual%20Fares%201995-2020%201Q2020.xlsx>.

unadjusted cost of an average domestic flight within the United States, the average airfare was \$355 roundtrip in 2019.<sup>31</sup> The total travel costs for applicants attending hearings in Washington, DC that typically last 3 nights and 4 days would be \$1,269 per person (\$355 average airfare + (\$216 hotel in Washington, DC x 3 nights) + (\$76 meals and incidentals x 2 days of stay) + (\$57 meals and incidentals x 2 travel days)) = \$1,269).

### Expert Witnesses

FEMA assumes that each party would make use of expert witnesses to support their case. The expert witnesses would be required to travel to the hearing at the expense of the party that hired them. Based on historical experience, preparing for the hearing is estimated to take 20 hours, the duration of the hearing is estimated to be 16 hours and the travel time is estimated at 11 hours for a total of 47 hours for a hearing in Washington, DC. Therefore, the opportunity costs of time for one expert witness to attend a hearing would be \$3,325 (\$70.74 engineers wages x 47 hours). Thus, the total cost for one expert witness' travel and opportunity cost of time is \$4,594 (\$1,269 + \$3,325). Table 2 shows the detailed costs per expert witness to attend a hearing in Washington, DC. To provide a range of estimates since cases vary, a hearing at the applicant's location for an expert witness would cost \$2,547 (\$70.74 engineers wages x 36 hours<sup>32</sup>). This total assumes the expert witness is local and therefore incurs no travel costs.

**Table 2. Estimated Cost per Expert Witness, Washington, DC Hearing (2019\$)**

Round trip flight (A)	Three nights of lodging at \$219 per night (B)	Meals and Incidentals (C)	Total Travel Expenses (D) = (A+B+C)	Opportunity Costs of Time for a hearing in Washington, DC (E)	Total expert witness cost (D+E)
\$355	\$648	\$266	\$1,269	\$3,325	\$4,594

<sup>31</sup> Unadjusted 2019 dollars. Excludes airline tickets under \$50.

<sup>32</sup> FEMA deducts the 11 hours of travel time from the total of 47 hours used for a hearing in Washington, DC to come up with the total time for a hearing at the applicant's location assuming the expert witness is also local. Therefore, 36 hours is derived from the 20 hours estimated for preparing for the hearing and 16 hours for the duration of the hearing.

## Cost for the Applicant

The typical total cost for the applicant includes travel expenses (round trip flight, three nights of lodging, and meals and incidentals) and opportunity costs of time for the applicant, the applicant's representatives, and the expert witnesses. The total travel expenses for the applicant and the representative would be \$2,538 (\$1,269 x 2 personnel = \$2,538), if the hearing is held in Washington, DC. As previously discussed in this analysis, costs include 47 hours for hearing preparation, attending the hearing, and post hearing work, plus 11 hours of travel time for applicants and the applicant's representative. FEMA notes that an applicant can choose not to bring a representative or an applicant's representative could be one attorney or in some cases more than one attorney. To provide a range of costs, FEMA analyzes the typical case where one attorney or no attorneys are present. If the applicant's representative is an attorney, the opportunity costs of time would be \$10,925 ((\$102.00 per hour wages for a lawyer x 58 hours) + (\$86.36 per hour wages for a general and operations manager x 58 hours) = \$10,925). If the applicant does not use an attorney as their representative, the opportunity costs of time would be \$10,018 (2 general and operations managers at \$86.36 each x 58 hours = \$10,018). Table 3 shows the range of total costs to the applicant which include the opportunity costs of time and the travel costs.

**Table 3. Range of Applicant Costs -Washington, DC Hearing (2019\$)**

	<b>Opportunity Cost of Time</b>	<b>Travel</b>	<b>Total</b>
<b>1 Attorney and 1 Non-Attorney</b>	\$10,925	\$2,538	\$13,463
<b>2 Non-Attorneys</b>	\$10,018	\$2,538	\$12,556

The total cost to the applicant if they were to travel to Washington, DC for a hearing with a representative and two expert witnesses, ranges from \$21,744 ((2 expert witnesses at a cost of \$4,594 each) + \$12,556 applicant cost) if the representatives are 2

non-attorneys to \$22,651 ((2 expert witnesses at \$4,594 each) + \$13,463 applicant and attorney cost) if the representatives are 1 attorney and 1 non-attorney.

For a local hearing, the costs to the applicant would include 47 hours of opportunity costs of time for the applicant and representative (assuming the representative is local), and 36 hours of opportunity costs of time to attend the hearing for two expert witnesses (assuming the expert witnesses are local) and would range from \$13,211 ((2 general and operations managers at \$86.36 each x 47 hours) + (2 expert witnesses at \$70.74 each x 36 hours) = \$13,211) to \$13,946 ((\$86.36 for a general and operations manager x 47 hours) + (\$102.00 for an attorney x 47 hours) + (2 expert witnesses at \$70.74 each x 36 hours) = \$13,946) depending on who the recipient uses as a representative. Table 4 shows the range of total costs for an applicant for hearings held at the applicant's location.

**Table 4. Applicant Costs – Local Hearing (2019\$)**

	<b>Expert Witnesses</b>	<b>Opportunity Cost of Time</b>	<b>Total</b>
<b>1 Attorney and 1 Non-Attorney</b>	\$5,093	\$8,853	\$13,946
<b>2 Non-Attorneys</b>	\$5,093	\$8,118	\$13,211

### **Cost for the Recipient**

The recipient would not present information in the arbitration case but would send one or more representatives in a supporting role for the applicant. The cost per arbitration case for the recipient is the opportunity costs of time for the representatives totaling \$10,018 (2 general and operations managers at \$86.36 each x 58 hours = \$10,018) and travel expenses \$2,538 (2 representatives x \$1,269) of those attending the hearing in Washington, DC. As shown in table 5, the total cost to the recipient would be \$12,556 if the hearing was held in Washington, DC.

**Table 5. Estimated Recipient Costs, Washington, DC Hearing (2019\$)**

	<b>Opportunity Cost of Time</b>	<b>Travel</b>	<b>Total</b>
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<b>General and Operations Managers</b>	\$10,018	\$2,538	\$12,556
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For a local hearing, two representatives would spend 47 hours on the case and the cost to the recipient would be \$8,118 (2 general and operations managers at \$86.36 each x 47 hours = \$8,118).

### **Cost to Government/FEMA**

FEMA would require two attorneys for a typical arbitration case, a GS-13 step 5 attorney and a GS-15 step 5 supervisory attorney, to review and to prepare a response to the request for arbitration. Based on historical experience, the two attorneys' total time from preparation to post hearing is 47 hours.<sup>33</sup> The opportunity costs of time of the attorneys, including preparation and review of a case, is \$8,832 (((\$78.62 GS-13 Step 5 attorney x 47 hours) + (\$109.30 GS 15 Step 5 Supervisory Attorney x 47) hours = \$8,832).

Based on historical experience, FEMA would also require four non-attorneys (e.g., GS-13 Step 5 program analysts) to support the arbitration case only for the duration of the hearing. The opportunity costs of time associated with the program analysts would be \$5,032 (4 GS-13 Step 5 program analysts at \$78.62 each x 16 hours = \$5,032). Thus, the total opportunity costs of time for all six FEMA personnel would be \$13,864. FEMA would also call their own expert witnesses to attend the hearing. Based on historical experience, FEMA assumes that it would use four expert witnesses per case<sup>34</sup> for a total of \$10,188 (\$2,547 cost per expert witness x 4 expert witnesses = \$10,188). The expert witnesses provide testimony on a range of subjects, for example soil degradation or building construction.

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<sup>33</sup> Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

<sup>34</sup> FEMA estimates that we could need up to four expert witnesses. FEMA's expert witnesses may or may not speak at the hearing. Additionally, FEMA may hire an expert witness so that FEMA can consult with them about the subject matter.

Arbitration hearings do not require transcription services. However, FEMA has historically hired a court reporter for hearings and provided the transcript to the CBCA for their records. FEMA will continue to pay for a court reporter for the duration of a hearing under the final rule, but will not provide a transcript to the CBCA. The opportunity costs of time for the court reporter services for a transcript would be \$730 per arbitration case (\$45.63 per hour wages for Court Reporters and Simultaneous Captioners x 16 hours of arbitration time = \$730).

The estimated total cost to FEMA, including staff time, expert witnesses, and transcript services, would be \$24,782 per case. Table 6 presents the cost of each component by opportunity cost of time and other costs.

**Table 6. Estimated FEMA Costs – Washington, DC Hearing (2019\$)**

<b>Cost for Four Expert Witnesses</b>	<b>Cost of Court Reporter</b>	<b>Cost for FEMA employees (2 attorneys and 4 program analysts)</b>	<b>Total Per-Case cost to FEMA</b>
\$10,188	\$730	\$13,864	\$24,782

For a hearing at the applicant's location, FEMA representatives would need to travel to the location of the hearing. Costs for a local hearing would be higher for FEMA due to paying for travel time as well as actual travel costs. Travel costs are estimated using the figures previously mentioned and would be \$1,269 per person for a total of \$2,538, if 2 attorneys travel to the applicant's location. Additionally, FEMA estimates that the time would increase to 58 hours due to 11 hours of travel time for the attorneys totaling (2 attorneys at \$109.30 each x 58 hours) \$12,679 plus \$5,032 for non-travelling program analysts resulting in a total cost of \$17,711. The total estimated costs to FEMA for a local hearing are presented in Table 7.

**Table 7. Estimated FEMA Costs – Local (2019\$)**

<b>Cost for Four Expert Witnesses</b>	<b>Cost of Court Reporter</b>	<b>Opportunity Costs of time for FEMA employees</b>	<b>Travel Costs (2 attorneys)</b>	<b>Total Per-Case cost to FEMA</b>
\$10,188	\$730	\$ 17,711	\$2,538	\$31,167

In addition to these costs, FEMA's PA Program hired an Arbitration Coordinator at the GS-13 Step 5 level with an annual salary of \$116,353. With the 1.46 multiplier for a fully loaded wage rate, the additional cost to FEMA is \$169,875 per year. Therefore, the annual total costs to FEMA range from \$194,657 (\$169,875 + \$24,782) if the hearing is held in Washington, DC to \$201,042 (\$169,875 + \$31,167) if the hearing is held at the applicant's location.

### **Total Costs**

The total cost per case vary based on who the applicant uses as a representative, and whether the hearing is held in Washington, DC or local to the applicant. Government and FEMA costs would be higher for a hearing held local to the applicant, and likewise, applicant and recipient costs would be higher if the hearing was held in Washington, DC. FEMA estimates that the total costs per case to range between \$52,496 and \$59,989.

Table 8 presents the range of estimated costs per arbitration case.

**Table 8. Total Cost Per Case (2019\$)**

	<b>FEMA</b>	<b>Applicant</b>	<b>Recipient</b>	<b>Total</b>
<b>Low</b>	\$31,167	\$13,211	\$8,118	\$52,496
<b>High</b>	\$24,782	\$22,651	\$12,556	\$59,989

As established earlier in this analysis, FEMA estimates an average of 15 arbitration cases per year. Therefore, FEMA estimates the total annual costs to range between \$957,315 ((15 cases x \$31,167 per case) + \$169,875 to hire a new FEMA employee + (15 cases x \$13,211 per case for applicant) + (15 cases x \$8,118 per case for the recipient)= \$957,315) (low) and \$1,069,710((15 cases x \$24,782 per case) + \$169,875 for a new FEMA employee + (15 cases x \$22,651 per case for the applicant) + (15 cases x \$12,556 for the recipient)= \$1,069,710) (high). Table 9 shows the estimated total costs per year of this final rule. The low-cost estimate assumes that all hearings would be held

at the applicant's location, while the high estimate assumes hearings would be held in Washington, DC.

**Table 9. Total Cost Per Year for 15 Cases. (2019\$)**

	<b>FEMA</b>	<b>Applicant</b>	<b>Recipient</b>	<b>Total</b>
<b>Low</b>	\$637,380	\$198,165	\$121,770	\$957,315
<b>High</b>	\$541,605	\$339,765	\$188,340	\$1,069,710

Tables 10 and 11 show the total 10-year costs and 10-year costs annualized at 3 percent and 7 percent.



**Table 10. 10-Year Cost Totals Using 3 Percent and 7 Percent Discount Rates (Low Estimate, 2019\$)**

Year	FEMA Costs	Applicant Costs	Recipient Costs	Total Costs	Annual Costs Discounted at 3% <sup>1</sup>	Annual Costs Discounted at 7% <sup>1</sup>
1	\$637,380	\$198,165	\$121,770	\$957,315	\$929,432	\$894,687
2	\$637,380	\$198,165	\$121,770	\$957,315	\$902,361	\$836,156
3	\$637,380	\$198,165	\$121,770	\$957,315	\$876,079	\$781,454
4	\$637,380	\$198,165	\$121,770	\$957,315	\$850,562	\$730,331
5	\$637,380	\$198,165	\$121,770	\$957,315	\$825,788	\$682,552
6	\$637,380	\$198,165	\$121,770	\$957,315	\$801,736	\$637,899
7	\$637,380	\$198,165	\$121,770	\$957,315	\$778,385	\$596,168
8	\$637,380	\$198,165	\$121,770	\$957,315	\$755,713	\$557,166
9	\$637,380	\$198,165	\$121,770	\$957,315	\$733,702	\$520,716
10	\$637,380	\$198,165	\$121,770	\$957,315	\$712,332	\$486,650
<b>Total</b>	\$6,373,800	\$1,981,650	\$1,217,700	\$9,573,150	\$8,166,090	\$6,723,779
<b>Annualized</b>					\$957,315	\$957,315
<sup>1</sup> The annualized amounts for 7 percent and 3 percent are equal in this table because the amounts for each year are identical and the first year is discounted.						

**Table 11. 10-Year Cost Totals Using 3 Percent and 7 Percent Discount Rates (High Estimate, 2019\$)**

Year	FEMA Costs	Applicant Costs	Recipient Costs	Total Costs	Annual Costs Discounted at 3% <sup>1</sup>	Annual Costs Discounted at 7% <sup>1</sup>
1	\$541,605	\$339,765	\$188,340	\$1,069,710	\$1,038,553	\$999,729
2	\$541,605	\$339,765	\$188,340	\$1,069,710	\$1,008,304	\$934,326
3	\$541,605	\$339,765	\$188,340	\$1,069,710	\$978,936	\$873,202
4	\$541,605	\$339,765	\$188,340	\$1,069,710	\$950,423	\$816,077
5	\$541,605	\$339,765	\$188,340	\$1,069,710	\$922,741	\$762,688
6	\$541,605	\$339,765	\$188,340	\$1,069,710	\$895,865	\$712,793
7	\$541,605	\$339,765	\$188,340	\$1,069,710	\$869,772	\$666,162
8	\$541,605	\$339,765	\$188,340	\$1,069,710	\$844,439	\$622,581
9	\$541,605	\$339,765	\$188,340	\$1,069,710	\$819,844	\$581,851
10	\$541,605	\$339,765	\$188,340	\$1,069,710	\$795,965	\$543,786
<b>Total</b>	\$5,416,050	\$3,397,650	\$1,883,400	\$10,697,100	\$9,124,842	\$7,513,195
<b>Annualized</b>					\$1,069,710	\$1,069,710
<sup>1</sup> The annualized amounts for 7 percent and 3 percent are equal in this table because the amounts for each year are identical and the first year is discounted.						

FEMA continues to believe that there will not be any implementation or familiarization costs. FEMA currently has an arbitration process that is very similar to the final rule for cases arising from Hurricanes Katrina and Rita. Additionally, FEMA has already notified eligible applicants, dating back to January 1, 2016 of their eligibility for arbitration under DRRA Section 1219.

Further, applicants will not have familiarization costs because the process for requesting arbitration will consist of an email request and will use materials previously submitted in the application for PA funding.

## **Benefits**

The benefits of this final rule are qualitative in nature and apply mostly to the applicant. FEMA believes that this final rule will further its mission of supporting State, Tribal, and local governments, as well as eligible PNPs by offering them an alternative procedure for disputing PA eligibility and funding decisions. Applicants retain the option to submit a second appeal. The final rule offers an alternative that the applicant might see as more impartial because the arbitration cases would be heard by CBCA judges, as opposed to second appeals that would continue to be conducted entirely within FEMA. Additionally, applicants have the opportunity to present their case in person and call expert witnesses to support their claims. These two options allow applicants to choose a course of action that is most appropriate to their circumstances.

## **Customization**

Applicants may select arbitration, if they consider this process more customizable. The arbitration process provides applicants with the opportunity to appear in person before an impartial panel and present evidence as to why they are disputing a FEMA determination. Applicants can also retain expert witnesses to provide support to their position. Expert witnesses provide testimony within their technical specialty to assist the arbitration panel in understanding the underlying work for which FEMA ultimately decides eligibility.

Additionally, applicants have the opportunity to respond in real time to evidence presented by FEMA, allowing them more control over the dispute than they might have under a second appeal. Applicants may opt to hire an expert witness in arbitration to help present the disputed information in a manner more favorable to the applicant. The ability to hire expert witnesses may provide applicants with additional utility and may be an incentive to select arbitration.

The final rule also allows applicants to present the same technical documentation in both the appeals and arbitration procedures. An applicant who submits a first appeal but elects withdrawal in favor of arbitration may opt to reuse the information in the request for arbitration that was previously submitted in the first appeal. Applicants may gain utility from the convenience of reusing documents.

### **Impartiality**

It is not possible to quantify an applicant's increased utility due to perceived impartiality. The purpose of arbitration is to create a process to resolve the issues in a manner satisfactory to all parties. Based on past cases, FEMA has granted or partially granted about 23 percent of the second appeals submitted by applicants.<sup>35</sup> CBCA has found in favor or partially in favor for the applicant about 13 percent of Katrina/Rita arbitrations.<sup>36</sup>

The applicant may nevertheless perceive they have a better opportunity to gain additional Federal funding through arbitration. Applicants may select arbitration to have cases reviewed by a third party, rather than an appeal process that is conducted entirely by FEMA. Applicants may perceive this to be a more impartial system, if the forum encourages both parties to solicit discussion rather than "paper" based appeals. Applicants may expect that impartiality would best achieve the objective of an equitable resolution.

Tables 12 and 13 analyze the historical outcomes from second appeals and arbitration from 44 CFR 206.209. Because of the unpredictable nature and unique circumstances of every disaster, these figures may not be representative of future outcomes, as the outcomes are based on the arbitration policies for Hurricanes Rita and Katrina and the unique circumstances of each case.

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<sup>35</sup> Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

<sup>36</sup> Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

**Table 12. Second Appeals Outcomes (2010-2019)**

<b>Second Appeal Outcome</b>	<b>Number of Cases</b>	<b>Percent</b>
Granted	138	15.8%
Denied	594	68.0%
Partially Granted	78	8.9%
Active	37	4.2%
Other <sup>1</sup>	27	3.1%
<b>Total</b>	<b>874</b>	<b>100.0%</b>
<sup>1</sup> The category of Other includes appeal decision not available, remand, rescind, arbitration, and withdrawn.		

**Table 13. Arbitration Outcomes under 44 CFR 206.209 (2010- 2019)**

<b>Arbitration Outcome</b>	<b>Number of Cases</b>	<b>Percent</b>
Matters Resolved Without CBCA Decision	24	33.3%
In Favor of FEMA	22	30.6%
In Favor of Applicant	6	8.3%
Partial in Favor of Applicant	3	4.2%
Withdrawn	12	16.7%
Other <sup>2</sup>	5	6.9%
<b>Total</b>	<b>72</b>	<b>100%</b>
<sup>2</sup> The category of Other includes other decision, dismissed, and ongoing cases.		

## Transfers

FEMA is unable to quantify transfers because of the unpredictability of the results of this final rule. Transfers would arise from the possibility that FEMA may award a different amount of grant funding under the arbitration process than it would under current regulations that only allow for a second appeal. However, it would be speculative for FEMA to make an estimate as to the potential changes in grant disbursement that would result from this final rule.

## Impacts

Table 14 summarizes the costs, benefits, and transfer impacts of this final rule.

**Table 14. OMB Circular A-4 Accounting Table**

<b>Category</b>	<b>Estimates</b>		<b>Units</b>		
	<b>Low Estimate</b>	<b>High Estimate</b>	<b>Dollar Year</b>	<b>Discount Rate</b>	<b>Period Covered</b>
<b>Benefits</b>					

Annualized Monetized	\$0	\$0	2019	7%	10 Years
	\$0	\$0	2019	3%	10 Years
Annualized Quantified	0	0			
	0	0			
Qualitative	<ul style="list-style-type: none"><li>• Additional option for review of PA projects and decisions.</li><li>• Greater perception of impartiality in the arbitration process.</li><li>• Ability to customize arbitration process.</li></ul>				
Costs					
Annualized Monetized	\$957,315	\$1,069,710	2019	7%	10 Years
	\$957,315	\$1,069,710	2019	3%	10 Years
Annualized Quantified	0	0			
	0	0			
Qualitative	<ul style="list-style-type: none"><li>• Longer time frame to resolve disputes under arbitration option.</li></ul>				
Transfers	Possible changes to PA grant disbursements.				
Effects					
Small Entities	FEMA expects 11 arbitration cases per year from small entities with an estimated cost of between \$13,211 and \$22,651 per small entity.				
Wages	None				
Growth	None				

## Uncertainty Analysis

The estimates of the costs of the final rule are subject to uncertainty due to the uniqueness of each arbitration case. The cost estimates can vary widely depending on complexity and other factors. As a result, the cost estimate could be overstated or understated.

There are several sources of uncertainty in this analysis: the number of eligible applicants, the final deadlines for filing, and the potential number of arbitration cases. Major disasters do not occur on a regular time interval. The severity of the disaster would affect the number of applicants that decide to apply for funding in the PA Program. The number of eligible applicants can vary year-to-year.

Historical data used in this analysis was based on the arbitration process for Hurricanes Katrina and Rita, which is different in a couple of key respects from this final arbitration process. While the cost shares for Katrina and Rita were 100 percent, cost

shares for future disaster declarations may be as high as 25 percent for applicants.<sup>37</sup>

Because Katrina/Rita applicants were not required to pay for any portion of their project cost, they had an incentive to apply for more costly projects and pursue arbitration when denied. Future disasters with a cost share may lead applicants to be more conservative in applying for PA projects, which may result in fewer arbitration requests than was indicated in the primary estimate.

Additionally, the timeframe for submitting arbitration requests under 44 CFR 206.209 was 30 days. However, FEMA is implementing a 60-day submission deadline for arbitration submissions under DRRRA requirements to align with the 60-day submission timeframe for second appeals. This additional time may affect the number of arbitration cases submitted in the future, but FEMA cannot reliably predict these impacts at this time.

## **Alternatives**

FEMA identified several alternative regulatory approaches to the requirements in this final rule. The alternatives included: (1) not issuing a mandatory regulation; (2) an alternate definition of rural; and (3) not requiring electronic submission.

FEMA did not consider the first alternative option of not issuing a mandatory regulation. The DRRRA mandates FEMA to promulgate a rule allowing the option of arbitration in lieu of a second appeal and specifies the CBCA as the arbitration administrator. As such, FEMA must pursue a regulatory action.

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<sup>37</sup> “The Federal share of assistance is not less than 75 percent of the eligible cost. The recipient determines how the non-Federal share (up to 25 percent) is split with the subrecipients (i.e. eligible applicants).” Program Overview: Public Assistance. FEMA. <https://www.fema.gov/assistance/public/program-overview>. Last accessed on: May 25, 2021.

FEMA considered using an alternate definition of rural, such as OMB's nonmetropolitan area definition. OMB's nonmetropolitan area is defined as areas outside the boundaries of metropolitan areas.<sup>38</sup>

Nonmetropolitan areas are outside the boundaries of metropolitan areas and are further subdivided into two types:

1. Micropolitan (micro) areas, which are nonmetro labor-market areas centered on urban clusters of 10,000-49,999 persons and defined with the same criteria used to define metro areas.
2. All remaining counties, often labeled "noncore" counties because they are not part of "core-based" metro or micro areas.

OMB defines metropolitan areas to include:

1. Central counties with one or more urbanized areas; urbanized areas are densely-settled urban entities with 50,000 or more people.
2. Outlying counties that are economically tied to the core counties as measured by labor-force commuting. Outlying counties are included if 25 percent of workers living in the county commute to the central counties, or if 25 percent of the employment in the county consists of workers coming out from the central counties—the so-called "reverse" commuting pattern.

FEMA did not recommend using OMB's definition because it combines rural area populations into Metropolitan counties. The OMB definition would also result in some rural areas, such as the Grand Canyon, being considered a metropolitan county. This alternative would not result in reducing the impact on small entities, while accomplishing the stated objective of the rule.

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<sup>38</sup> 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas; Notice. Office of Management and Budget. See 75 FR 37246, June 28, 2010. <https://www.govinfo.gov/content/pkg/FR-2010-06-28/pdf/2010-15605.pdf>. Last accessed: May 25, 2021.

FEMA considered not requiring applicants to submit a request for arbitration electronically. Current practices allow FEMA to accept hard copy submissions (through U.S. Mail or other means) for first and second appeals. In addition, FEMA currently accepts electronic submissions for requests for arbitration under 44 CFR 206.209. FEMA chose to require electronic submissions as it would provide FEMA with enhanced ability to track and establish deadlines in the arbitration process. CBCA's rule requires applicants to use an electronic method to submit their documentation and request for arbitration to CBCA. Thus, requiring electronic submission will not pose an undue burden on most applicants.

#### *B. Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impact on small entities. An agency must prepare a Final Regulatory Flexibility Analysis (FRFA) unless it determines and certifies that a rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. This final rule will not have a significant economic impact on a substantial number of small entities. In accordance with the Regulatory Flexibility Act, a FRFA must contain the following statements, including descriptions of the reason(s) for the rulemaking, its objective(s), the affected small entities, any additional burden for book or record keeping and other compliance requirements; any Federal rules that duplicate, overlap, or conflict with the rulemaking, and significant alternatives considered. The following sections address these subjects individually in the context of this final rule.

#### **1. Statement of a need for, and objectives of the rule.**

PA helps State and local governments respond to and recover from the challenges faced during major disasters and emergencies. To support State and local governments facing those challenges, Congress passed DRRA.



Under the PA Program, as authorized by the Stafford Act, FEMA awards grants to eligible applicants to assist them in responding to and recovering from Presidentially-declared emergencies and major disasters. The recipient, as defined at 44 CFR 206.201(m), is the government to which a grant is awarded, and which is accountable for the use of the funds provided. Generally, the State for which the emergency or major disaster is declared is the recipient. The recipient can also be an Indian Tribal government. The applicant, as defined at 44 CFR 206.201(a), is a State agency, local government, or eligible PNP submitting an application to the recipient for assistance under the State's grant.

The PA Program provides Federal funds for debris removal, emergency protective measures, repair and replacement of roads and bridges, utilities, water treatment facilities, public buildings, and other infrastructure. When the President declares an emergency or major disaster declaration authorizing disbursement of funds through the PA Program, that presidential declaration automatically authorizes FEMA to accept applications from eligible applicants under the PA Program. To apply for a grant under the PA Program, the eligible applicant must submit a Request for PA to FEMA through the recipient. Upon award, the recipient notifies the applicant of the award, and the applicant becomes a subrecipient.

Applicants currently have a right to arbitration to dispute FEMA eligibility determinations associated with Hurricanes Katrina and Rita; see 44 CFR 206.209. The DRRRA amended the Stafford Act and FEMA promulgated a regulation providing all applicants the right to request arbitration for disputes under all disaster declarations after January 1, 2016 that are above certain dollar amount thresholds. This final rule implements the Section 1219 requirements of DRRRA and will grant applicants an additional method of recourse.

**2. Statement of the significant issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis (IRFA), a statement of the assessment of the agency of such issues, and a statement of any changes made to the proposed rule as a result of such comments.**

FEMA did not receive any comments on the IRFA for this rule, and therefore did not make any changes to this FRFA from the proposed rule due to public comments.

**3. The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made to the final rule as a result of the comments.**

FEMA did not receive any comments on the proposed rule from the Chief Counsel for Advocacy of the SBA.

**4. A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.**

“Small entity” is defined in 5 U.S.C. 601. The term “small entity” can have the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” Section 601(3) defines a “small business” as having the same meaning as “small business concern” under Section 3 of the SBA. This includes any small business concern that is independently owned and operated and is not dominant in its field of operation. Section 601(4) defines a “small organization” as any not-for-profit enterprise which is independently owned and operated and is not dominant in their field of operation. Section 601(5) defines “small governmental jurisdiction” as governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.

The SBA also stipulates in its size standards of how large an entity may be and still be classified as a “small entity.” These small business size standards are matched to

industries described in the North American Industry Classification System to determine if an entity is considered small.

This final rule does not place any additional requirements on small entities. It does, however, offer them an alternative means to dispute FEMA's determination for PA eligibility. If the entity chooses to dispute a PA determination, and they select arbitration rather than a second appeal, they would be responsible for their share of the cost of the arbitration process.

All small entities would have to meet the final requirements to be eligible for arbitration. FEMA identified 3,478 applicants for FEMA's PA Program<sup>39</sup> that would be eligible for arbitration under the final requirements for the time frame from 2010 through 2019. FEMA used Slovin's formula<sup>40</sup> and a 90 percent confidence interval to determine the sample size. FEMA sampled 97 of these applicants and found that 74 (76 percent) met the definition of a small entity based on the population size of local governments (less than 50,000 population),<sup>41</sup> or PNPs based on size standards set by the SBA.<sup>42</sup> The remaining 23 entities were not found to be considered small entities. Eligible small entities included 67 small government agencies and seven PNP organizations. Based on information presented in the Executive Orders 12866 and 13563 section, FEMA estimates 15 arbitration cases per year. If 76 percent of these are small entities, FEMA estimates 11 arbitration requests per year from small entities with an average cost of between \$13,211 and \$22,651 per case. Eleven small entities do not represent a

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<sup>39</sup> FEMA reported 3,778 applicants in the NPRM to this rule. The number of applicants has since been adjusted to account for more recent data and new timeframe for analysis. The NPRM contained data from 2009–2017 due to the limited data available at that time. This final rule contains data from 2010-2019.

<sup>40</sup> Slovin's formula is  $n = N / (1 + N * e^2)$ .  $3,478 / (1 + 3,478 \times 0.1^2) = 97$  (rounded).

<sup>41</sup> Information on population sizes was obtained using the U.S. Census Bureau's City and Town Population Totals 2010-2018. Available at <https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-cities-and-towns.html>.

<sup>42</sup> Small Business Administration. "Table of Size Standards" (.xlsx). Available at <https://www.sba.gov/document/support-table-size-standards>. Revenue and employment information for individual PNP's was obtained from PNP websites.

substantial number of small entities impacted by this final rule and the costs imposed to these small entities are not significant.

**5. Description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.**

*Arbitration*—As an alternative to the appeal process, applicants may request arbitration of the disputed determination. To be eligible for Section 423 arbitration, a PA applicant's request must meet all three of the following conditions: (1) the amount in dispute arises from a disaster declared after January 1, 2016; (2) the disputed amount exceeds \$500,000 (or \$100,000 if the applicant is in a "rural area," defined as having a population of less than 200,000 living outside an urbanized area); and (3) the applicant submitted a first appeal with FEMA pursuant to the requirements established in 44 CFR 206.206.

The applicant must submit a Request for Arbitration to the recipient, CBCA, and FEMA. The Request for Arbitration must contain a written statement, which specifies the amount in dispute, all documentation supporting the position of the applicant, the disaster number, and the name and address of the applicant's authorized representative or counsel. FEMA estimates that it will take an applicant 2 hours to complete the Request for Arbitration (these 2 hours are accounted for in the economic analysis through the 47 hours of hearing preparation time for applicants) with a wage rate of \$86.36 for a general and operations manager. FEMA estimates the opportunity cost of time for completing the request will be \$172.72 per applicant. With an estimated 11 cases per year, FEMA estimates the total burden for completing the request is \$1,900 per year. The person completing the request would need to be familiar with PA regulations and policies.

**6. Description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.**

The alternatives included: (1) using another definition for “rural” and (2) not requiring electronic submission.

FEMA considered using OMB’s nonmetropolitan area definition as an alternate definition of the term “rural.” OMB’s nonmetropolitan area is defined as areas outside the boundaries of metropolitan areas and are further subdivided into two types:

1. Micropolitan (micro) areas, which are nonmetro labor-market areas centered on urban clusters of 10,000-49,999 persons and defined with the same criteria used to define metro areas.
2. All remaining counties, often labeled “noncore” counties because they are not part of “core-based” metro or micro areas.

OMB defines metropolitan areas to include:

1. Central counties with one or more urbanized areas; urbanized areas are densely-settled urban entities with 50,000 or more people.
2. Outlying counties that are economically tied to the core counties as measured by labor-force commuting. Outlying counties are included if 25 percent of workers living in the county commute to the central counties, or if 25 percent of the employment in the county consists of workers coming out from the central counties—the so-called “reverse” commuting pattern.

FEMA did not recommend using the OMB's definition as it combines rural area populations into Metropolitan counties. The OMB definition would also result in some rural areas, such as the Grand Canyon, being considered a metropolitan county. This alternative would not result in reducing the impact on small entities while accomplishing the stated objective of the rule.

FEMA considered not requiring electronic submission. Current practices allow FEMA to accept physical mail for appeals. In addition, FEMA currently accepts electronic submissions for requests for arbitration under 44 CFR 206.209. As CBCA provided an electronic address for applicants to submit their request for arbitration and documentation, applicants must use electronic method if they choose the arbitration process. Thus, electronic submission will not pose an additional undue burden on applicants that are considered small entities.

## **Conclusion**

This rule codifies legislative requirements included in the DRRRA, which adds arbitration as a permanent alternative to a second appeal under the PA Program. Additionally, applicants that have had a first appeal pending with FEMA for more than 180 calendar days may withdraw such appeal and submit a request for arbitration. On December 18, 2018, FEMA implemented section 1219 of DRRRA by posting a Fact Sheet on its website. On June 21, 2019, CBCA published a final rule (see 84 FR 29085) and FEMA has published a corresponding fact sheet. PA arbitration has been available for disasters declared after January 1, 2016. FEMA certifies that this regulation will not have a significant economic impact on a substantial number of small entities.

### *C. Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 658, 1501-1504, 1531-1536, 1571 (the Act), pertains to any final rulemaking which implements any rule that includes a Federal mandate that may result in the expenditure by State, local, and Tribal

governments, in the aggregate, or by the private sector, of \$100 million (adjusted annually for inflation) or more in any one year. If the rulemaking includes a Federal mandate, the Act requires an agency to prepare an assessment of the anticipated costs and benefits of the Federal mandate. The Act also pertains to any regulatory requirements that might significantly or uniquely affect small governments. Before establishing any such requirements, an agency must develop a plan allowing for input from the affected governments regarding the requirements. Exemptions from the Act are found at 2 U.S.C. 1503, they include any regulation or final regulation that “provides for emergency assistance or relief at the request of any State, local, or tribal government or any official of a State, local, or tribal government.” Thus, FEMA finds this rule to be exempt from the Act.

Additionally, FEMA has determined that this rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, nor by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year because of a Federal mandate, and it would not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### *D. Paperwork Reduction Act of 1995*

As required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13, 109 Stat. 163, (May 22, 1995) (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

This proposed information collection previously published in the *Federal Register* on August 31, 2020 at 85 FR 53725 as part of the NPRM. Since the proposed information collection published on August 31, 2020, FEMA completed an emergency

revision of information collection 1660-0017. In the emergency information collection for 1660-0017 FEMA added the FEMA Template 104-FY-21-100

Equitable COVID-19 Response and Recovery: Vaccine Administration Information which resulted in 51,016 new Total No. of Responses with an .5 Average Burden per response of (in hours) which resulted in 25,508 Total Annual Burden (in hours) totaling \$1,445,028 in additional Total Annual Respondent Cost. Also, FEMA is correcting the wage rate used to calculate the *Estimated Total Annual Respondent Cost* in the NPRM, which resulted in a decrease of the *Estimated Total Annual Respondent Cost* from \$29,601,921 to \$27,845,344. FEMA incorrectly used the wage rate for the whole industry, instead of the State government industry wage rate.<sup>43</sup> Additionally, the NPRM incorrectly listed the proposed decrease to the *Estimated Total Annual Cost to the Federal Government* as \$29,976, an error of \$2,498. Rather, the NPRM should have listed a proposed decrease of \$27,478 in arbitration travel costs; as, we do not have to include them per the PRA exceptions for civil & administrative actions. See 44 U.S.C. 3518(c). Additionally, the Staff Salaries changed as the wage rate multiplier changed from 1.6 to 1.45. Finally, the NPRM incorrectly listed the *Estimated Total Annual Costs to the Federal Government*, as \$1,890,650, when the NPRM should have listed it as \$1,930,187, due to the previously mentioned changes. No comments were received regarding the proposed information collection. The purpose of this section is to notify the public that FEMA will submit the information collection abstracted below to OMB for review and clearance. This final rule serves as the 30-day comment period pursuant to 5 CFR 1320.12. FEMA invites the public to comment on this collection of information.

#### Collection of Information

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<sup>43</sup> Bureau of Labor Statistics, Occupational Employment and Wage Statistics. <https://www.bls.gov/oes/>. Last accessed: June 10, 2021.



*Title:* PA Program.

*Type of information collection:* Revision of a currently approved collection.

*OMB Number:* 1660-0017.

*Form Forms:* FEMA Form 009-0-49 Request for Public Assistance; FEMA Form 009-0-91 Project Worksheet (PW); FEMA Form 009-0-91A Project Worksheet (PW) - Damage Description and Scope of Work; FEMA Form 009-0-91B Project Worksheet (PW) - Cost Estimate Continuation Sheet; FEMA Form 009-0-91C Project Worksheet (PW) - Maps and Sketches Sheet; FEMA Form 009-0-91D Project Worksheet (PW) - Photo Sheet; FEMA Form 009-0-120 Special Considerations Questions; FEMA Form 009-0-121 PNP Facility Questionnaire; FEMA Form 009-0-123 Force Account Labor Summary Record; FEMA Form 009-0-124 Materials Summary Record; FEMA Form 009-0-125 Rented Equipment Summary Record; FEMA Form 009-0-126 Contract Work Summary Record; FEMA Form 009-0-127 Force Account Equipment Summary Record; FEMA Form 009-0-128 Applicant's Benefits Calculation Worksheet; FEMA Form 009-0-111, Quarterly Progress Report; FEMA Form 009-0-141, FAC-TRAX System, FEMA Template 104-FY-21-100 Equitable COVID-19 Response and Recovery: Vaccine Administration Information.

*Abstract:* The information collected is utilized by FEMA to make determinations for PA grants based on the information supplied by the respondents.

*Affected Public:* State, local, or Tribal Government.

*Estimated Number of Respondents:* 1,068.

*Estimated Number of Responses:* 449,084.

*Estimated Total Annual Burden Hours:* 491,533.

The final regulation would provide applicants an additional choice in FEMA's appeals and arbitration processes: applicants must choose either submitting a second appeal or submitting a request for arbitration. Or, an applicant may select arbitration if

the Regional Administrator has received a first appeal but has not rendered a decision within 180 calendar days of receipt. There is no change to the number of responses due to the final rule, as applicants can only choose one option. The final rule's implementation would not impact the total number of responses or burden hours.

FEMA estimated it will take approximately 2 hours to prepare an electronic appeal or arbitration. This estimate is based on the assumption that most of the information necessary for preparing the appeal or arbitration request is found in the existing Project Worksheet.

Recipients will also provide a recommendation per each applicant request for an appeal or arbitration. The total number of recommendations would not change because of the final rule. FEMA estimates it will take approximately 1 hour to prepare a recommendation.

Currently, the estimated time to complete a request and submit a letter of recommendation for an appeal is three hours. FEMA also estimates the time to complete a request and submit an electronic recommendation for arbitration would also be three hours. The applicant could re-use the same information from the request for an appeal or arbitration and the recipient would review similar information in providing its recommendation. The final rule would not impact the estimate of the burden hours.

Table 15 provides estimates of annualized cost to respondents for the hour burdens for the collection of information.

**Table 15. Estimated Annualized Burden Hours and Costs**

Type of Respondent	Form Name / Form No.	No. of Respondents	No. of Responses per Respondent	Total No. of Responses	Avg. Burden per Response (in hours)	Total Annual Burden (in hours)	Avg. Hourly Wage Rate	Total Annual Respondent Cost
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State, Local or Tribal Government	FEMA Form 009-0-49, Request for PA	56	129	7,224	0.25	1,806	\$56.65	\$102,310
State, Local or Tribal Government	FEMA Form 009-0-91, Project Worksheet (PW) and a Request for Time Extension	56	840	47,040	1.5	70,560	\$56.65	\$3,997,224
State, Local or Tribal Government	FEMA Form 009-0-91A Project Work Sheet (PW) Damage Description and Scope of Work	56	784	43,904	1.5	65,856	\$56.65	\$3,730,742
State, Local or Tribal Government	FEMA Form 009-0-91B, Project Worksheet (PW) Cost Estimate Continuation Sheet and Request for additional funding for Cost Overruns	56	784	43,904	1.3333	58,537	\$56.65	\$3,316,121
State, Local or Tribal Government	FEMA Form 009-0-91C Project Worksheet (PW) Maps and Sketches Sheet	56	728	40,768	1.5	61,152	\$56.65	\$3,464,261

State Local or Tribal Government	FEMA Form 009-0-91D Project Worksheet (PW) Photo Sheet	56	728	40,768	1.5	61,152	\$56.65	\$3,464,261
State, Local or Tribal Government	FEMA Form 009-0-120, Special Considerations Questions /	56	840	47,040	0.5	23,520	\$56.65	\$1,332,408
State, Local or Tribal Government	FEMA Form 009-0-128, Applicant's Benefits Calculation Worksheet /	56	784	43,904	0.5	21,952	\$56.65	\$1,243,581
State, Local or Tribal Government	FEMA Form 009-0-121, PNP Facility Questionnaire	56	94	5,264	0.5	2,632	\$56.65	\$149,103
State, Local or Tribal Government	FEMA Form 009-0-123, Force Account Labor Summary Record	56	94	5,264	0.5	2,632	\$56.65	\$149,103
State, Local or Tribal Government	FEMA Form 009-0-124, Materials Summary Record /	56	94	5,264	0.25	1,316	\$56.65	\$74,551
State, Local or Tribal Government	FEMA Form 009-0-125, Rented Equipment Summary Record	56	94	5,264	0.5	2,632	\$56.65	\$149,103

State, Local or Tribal Government	FEMA Form 009-0-126, Contract Work Summary Record /	56	94	5,264	0.5	2,632	\$56.65	\$149,103
State, Local or Tribal Government	FEMA Form 009-0-127, Force Account Equipment Summary Record /	56	94	5,264	0.25	1,316	\$56.65	\$74,551
State, Local or Tribal Government	State Administrative Plan and State Plan Amendments/ No Form	56	1	56	8	448	\$56.65	\$25,379
State, Local or Tribal Government	FEMA Form 009-0-111, Quarterly Progress Report	56	4	224	100	22,400	\$56.65	\$1,268,960
State, Local or Tribal Government	Request for Appeals or Arbitrations & Recommendation /No Forms	56	9	504	3	1,512	\$56.65	\$85,655
State, Local or Tribal Government	Request for Arbitration & Recommendation resulting from Hurricanes Katrina or Rita/ No Form	4	5	20	3	60	\$56.65	\$3,399

State, Local or Tribal Government	FEMA Form 009-0-141, FAC- TRAX System	56	913	51,128	1.25	63,910	\$56.65	\$3,620,502
State, Local or Tribal Government		56		51,016		25,508		\$1,445,028
<b>Total</b>		1,068		449,084		491,533		\$27,845,344

Note: The “Avg. Hourly Wage Rate” for each respondent includes a 1.62 multiplier to reflect a fully-loaded wage rate.

*Estimated Total Annual Respondent Cost: \$27,845,344.*

*Estimated Respondents’ Operation and Maintenance Costs: N/A.*

*Estimated Respondents’ Capital and Start-Up Costs: N/A.*

*Estimated Total Annual Costs to the Federal Government: \$1,930,187.*

#### *E. Privacy Act*

Under the Privacy Act of 1974, 5 U.S.C. 552a, an agency must determine whether implementation of a final regulation will result in a system of records. A “record” is any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his/her education, financial transactions, medical history, and criminal or employment history and that contains his/her name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. See 5 U.S.C. 552a(a)(4). A “system of records” is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. An agency cannot disclose any record which is contained in a system of records except by following specific procedures.

In accordance with DHS policy, FEMA has completed a Privacy Threshold Analysis (PTA) for this final rule. DHS has determined that this final rule does not affect the 1660-0017 OMB Control Number's current compliance with the E-Government Act of 2002 or the Privacy Act of 1974, as amended. As a result, DHS has concluded that the 1660-0017 OMB Control Number is covered by the DHS/FEMA/PIA-013 Grants Management Programs Privacy Impact Assessment (PIA). Additionally, DHS has decided that the 1660-0017 OMB Control Number is covered by the DHS/FEMA—009 Hazard Mitigation, Disaster Public Assistance, and Disaster Loan Programs System of Records, 79 FR 16015, Mar. 24, 2014 System of Records Notice (SORN).

*F. National Environmental Policy Act of 1969 (NEPA)*

Section 102 of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*) requires Federal agencies to consider the impacts of their proposed actions on the quality of the human environment. Each agency can develop categorical exclusions (catexes) to cover actions that have been demonstrated to not typically trigger significant impacts to the human environment individually or cumulatively. If an action does not qualify for a catex and has the potential to significantly affect the environment, agencies develop environmental assessments (EAs) to evaluate those actions. The Council on Environmental Quality's procedures for implementing NEPA, 40 CFR Parts 1500 through 1508, require Federal agencies to prepare Environmental Impact Statements (EISs) for major Federal actions significantly affecting the quality of the human environment. At the end of the EA process, the agency will determine whether to make a Finding of No Significant Impact or whether to initiate the EIS process.

Rulemaking is a major Federal action subject to NEPA. The list of catexes at DHS Instruction Manual 023-01-001-01 (Revision 01), "Implementation of the National Environmental Policy Act (NEPA)," Appendix A, includes a catex for the promulgation

of certain types of rules, including rules that implement, without substantive change, statutory or regulatory requirements and rules that interpret or amend an existing regulation without changing its environmental effect. (Catex A3(b) and (d)).

The purpose of this rule is to finalize the proposed regulations to implement the new right of arbitration authorized by the DRRRA, and to revise FEMA's regulations regarding first and second PA appeals. Additionally, in response to a public comment, FEMA is adding a definition of *Regional Administrator*. Plus, FEMA made changes to the regulatory text regarding first appeals and second appeals at 206.206(b)(1)(ii)(A) and (b)(2)(ii)(A) as a result of the 60-day appeals deadline comments. Finally, FEMA is making two technical revisions at 206.206(b) and 206.206(b)(3)(i)(A) to align the regulatory text with the dispute of the eligibility for assistance or repayment of assistance language of Section 423(d)(1) of the Stafford Act. These changes are to implement statutory requirements and to amend existing regulation without changing its environmental effect, consistent with Catex A3(b) and (d), as defined in DHS Instruction Manual 023-01-001-01 (Rev. 01), Appendix A. No extraordinary circumstances exist that will trigger the need to develop an EA or EIS. See DHS Instruction Manual 023-01-001-01 V(B)(2).

*G. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments*

Executive Order 13175, "Consultation and Coordination With Indian Tribal Governments," 65 FR 67249, Nov. 9, 2000, applies to agency regulations that have Tribal implications, that is, regulations that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Under this Executive Order, to the extent practicable and permitted by law, no



agency will promulgate any regulation that has Tribal implications, that imposes substantial direct compliance costs on Indian Tribal governments, and that is not required by statute, unless funds necessary to pay the direct costs incurred by the Indian Tribal government or the Tribe in complying with the regulation are provided by the Federal Government, or the agency consults with Tribal officials.

The purpose of this rule is to finalize the proposed regulations to implement the new right of arbitration authorized by the DRRA, and to revise FEMA's regulations regarding first and second PA appeals. Additionally, in response to a public comment, FEMA is adding a definition of *Regional Administrator*. Plus, FEMA made changes to the regulatory text regarding first appeals and second appeals at 206.206(b)(1)(ii)(A) and (b)(2)(ii)(A) as a result of the 60-day appeals deadline comments. Finally, FEMA is making two technical revisions at 206.206(b) and 206.206(b)(3)(i)(A) to align the regulatory text with the dispute of the eligibility for assistance or repayment of assistance language of Section 423(d)(1) of the Stafford Act.

Under the final rule, Indian Tribal Governments have the same opportunity to participate in arbitrations as other eligible applicants; however, given the participation criteria required under 42 U.S.C. 5189a(d) and its voluntary nature, FEMA anticipates a very small number, if any Indian Tribal Governments, will participate in the new permanent right of arbitration. FEMA also anticipates a very small number of Indian Tribal Governments will be affected by the other major revisions to 44 CFR 206.206. As a result, FEMA does not expect this final rule to have a substantial direct effect on one or more Indian Tribal Governments or impose direct compliance costs on Indian Tribal Governments. Additionally, since FEMA anticipates a very small number, if any Indian Tribal Governments will participate in the arbitration portion of the final rule nor will be affected by the rest of the finalized revisions to 44 CFR 206.206, FEMA does not expect the regulations to have substantial direct effects on the relationship between the Federal

Government and Indian Tribal Governments or on the distribution of power and responsibilities between the Federal Government and Indian Tribal Governments.

*H. Executive Order 13132, Federalism*

A rule has implications for federalism under Executive Order 13132 “Federalism” (64 FR 43255, Aug. 10, 1999), if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. FEMA has analyzed this final rule under Executive Order 13132 and determined that it does not have implications for federalism.

*I. Executive Order 12630, Taking of Private Property*

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, “Governmental Actions and Interference With Constitutionally Protected Property Rights” (53 FR 8859, Mar. 18, 1988).

*J. Executive Order 12898, Environmental Justice*

Executive Order 12898 “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations” (59 FR 7629, Feb. 16, 1994), as amended by Executive Order 12948 (60 FR 6381, Feb. 1, 1995) mandates that Federal agencies identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations. It requires each Federal agency to conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that those programs, policies, and activities do not have the effect of excluding persons from participation in, denying persons the benefit of, or subjecting persons to discrimination because of their race, color, or national origin or income level.

The purpose of this rule is to finalize the proposed regulations to implement the new right of arbitration authorized by the DRRA, and to revise FEMA's regulations regarding first and second PA appeals. Additionally, in response to a public comment, FEMA is adding a definition of *Regional Administrator*. Plus, FEMA made changes to the regulatory text regarding first appeals and second appeals at 206.206(b)(1)(ii)(A) and (b)(2)(ii)(A) as a result of the 60-day appeals deadline comments. Finally, FEMA is making two technical revisions at 206.206(b) and 206.206(b)(3)(i)(A) to align the regulatory text with the dispute of the eligibility for assistance or repayment of assistance language of Section 423(d)(1) of the Stafford Act. There are no adverse effects and no disproportionate effects on minority or low-income populations.

*K. Executive Order 12988, Civil Justice Reform*

This final rule meets applicable standards in Sections 3(a) and 3(b)(2) of Executive Order 12988, "Civil Justice Reform" (61 FR 4729, Feb. 7, 1996), to minimize litigation, eliminate ambiguity, and reduce burden.

*L. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks*

This final rule will not create environmental health risks or safety risks for children under Executive Order 13045, "Protection of Children From Environmental Health Risks and Safety Risks" (62 FR 19885, Apr. 23, 1997).

*M. Congressional Review of Agency Rulemaking*

Under the Congressional Review of Agency Rulemaking Act (CRA), 5 U.S.C. 801-808, before a rule can take effect, the Federal agency promulgating the rule must submit to Congress and to the Government Accountability Office (GAO) a copy of the rule; a concise general statement relating to the rule, including whether it is a major rule; the proposed effective date of the rule; a copy of any cost-benefit analysis; descriptions of the agency's

actions under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act; and any other information or statements required by relevant executive orders.

FEMA has submitted this final rule to the Congress and to GAO pursuant to the CRA. OMB has determined that this rule is not a “major rule” within the meaning of the CRA.

#### **List of Subjects in 44 CFR Part 206**

Administrative practice and procedure, Coastal zone, Community facilities, Disaster assistance, Fire prevention, Grant programs-housing and community development, Housing, Insurance, Intergovernmental relations, Loan programs-housing and community development, Natural resources, Penalties, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Federal Emergency Management Agency amends 44 CFR part 206 as follows:

#### **PART 206 – FEDERAL DISASTER ASSISTANCE**

1. The authority citation for part 206 continues to read as follows:

**Authority:** Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 through 5207; Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*; Department of Homeland Security Delegation 9001.1.

2. Revise § 206.206 to read as follows:

#### **§ 206.206 Appeals and arbitrations.**

- (a) *Definitions.* The following definitions apply to this section:

*Administrator* means the Administrator of the Federal Emergency Management Agency.

*Amount in dispute* means the difference between the amount of financial assistance sought for a Public Assistance project and the amount of financial assistance for which FEMA has determined such Public Assistance project is eligible.

*Applicant* has the same meaning as the definition at § 206.201(a).

*Final agency determination means:* (1) The decision of FEMA, if the applicant or recipient does not submit a first appeal within the time limits provided for in paragraph (b)(1)(ii)(A) of this section; or

(2) The decision of FEMA, if the applicant or recipient withdraws the pending appeal and does not file a request for arbitration within 30 calendar days of the withdrawal of the pending appeal; or

(3) The decision of the FEMA Regional Administrator, if the applicant or recipient does not submit a second appeal within the time limits provided for in paragraph (b)(2)(ii)(A) of this section.

*Recipient* has the same meaning as the definition at § 206.201(m).

*Regional Administrator* means an administrator of a regional office of FEMA, or his/her designated representative.

*Rural area* means an area with a population of less than 200,000 outside an urbanized area.

*Urbanized area* means an area that consists of densely settled territory that contains 50,000 or more people.

(b) *Appeals and Arbitrations.* An eligible applicant or recipient may appeal any determination previously made related to an application for or the provision of Public Assistance according to the procedures of this section. An eligible applicant may request arbitration to dispute the eligibility for assistance or repayment of assistance.

(1) *First Appeal.* The applicant must make a first appeal in writing and submit it electronically through the recipient to the Regional Administrator. The recipient must include a written recommendation on the applicant's appeal with the electronic submission of the applicant's first appeal to the Regional Administrator. The recipient may make recipient-related appeals to the Regional Administrator.

(i) *Content*. A first appeal must:

(A) Contain all documented justification supporting the applicant or recipient's position;

(B) Specify the amount in dispute, as applicable; and

(C) Specify the provisions in Federal law, regulation, or policy with which the applicant or recipient believes the FEMA determination was inconsistent.

(ii) *Time Limits*. (A) The applicant may make a first appeal through the recipient within 60 calendar days from the date of the FEMA determination that is the subject of the appeal and the recipient must electronically forward to the Regional Administrator the applicant's first appeal with a recommendation within 120 calendar days from the date of the FEMA determination that is the subject of the appeal. If the applicant or the recipient do not meet their respective 60-calendar day and 120-calendar day deadlines, FEMA will deny the appeal. A recipient may make a recipient-related first appeal within 60 calendar days from the date of the FEMA determination that is the subject of the appeal and must electronically submit their first appeal to the Regional Administrator.

(B) Within 90 calendar days following receipt of a first appeal, if there is a need for additional information, the Regional Administrator will provide electronic notice to the recipient and applicant. If there is no need for additional information, then FEMA will not provide notification. The Regional Administrator will generally allow the recipient 30 calendar days to provide any additional information.

(C) The Regional Administrator will provide electronic notice of the disposition of the appeal to the applicant and recipient within 90 calendar days of receipt of the appeal or within 90 calendar days following the receipt of additional information or following expiration of the period for providing the information.

(iii) *Technical Advice*. In appeals involving highly technical issues, the Regional Administrator may, at his or her discretion, submit the appeal to an independent scientific

or technical person or group having expertise in the subject matter of the appeal for advice or recommendation. The period for this technical review may be in addition to other allotted time periods. Within 90 calendar days of receipt of the report, the Regional Administrator will provide electronic notice of the disposition of the appeal to the recipient and applicant.

(iv) *Effect of an Appeal.* (A) FEMA will take no action to implement any determination pending an appeal decision from the Regional Administrator, subject to the exceptions in paragraph (b)(1)(iv)(B) of this section.

(B) Notwithstanding paragraph (b)(1)(iv)(A) of this section, FEMA may:

(1) Suspend funding (see 2 CFR 200.339);

(2) Defer or disallow other claims questioned for reasons also disputed in the pending appeal; or

(3) Take other action to recover, withhold, or offset funds if specifically authorized by statute or regulation.

(v) *Implementation.* If the Regional Administrator grants an appeal, the Regional Administrator will take appropriate implementing action(s).

(vi) *Guidance.* FEMA may issue separate guidance as necessary to supplement paragraph (b)(1) of this section.

(2) *Second Appeal.* If the Regional Administrator denies a first appeal in whole or in part, the applicant may make a second appeal in writing and submit it electronically through the recipient to the Assistant Administrator for the Recovery Directorate. The recipient must include a written recommendation on the applicant's appeal with the electronic submission of the applicant's second appeal to the Assistant Administrator for the Recovery Directorate. The recipient may make recipient-related second appeals to the Assistant Administrator for the Recovery Directorate.

(i) *Content.* A second appeal must:

(A) Contain all documented justification supporting the applicant or recipient's position;

(B) Specify the amount in dispute, as applicable; and

(C) Specify the provisions in Federal law, regulation, or policy with which the applicant or recipient believes the FEMA determination was inconsistent.

(ii) *Time Limits.* (A) If the Regional Administrator denies a first appeal in whole or in part, the applicant may make a second appeal through the recipient within 60 calendar days from the date of the Regional Administrator's first appeal decision and the recipient must electronically forward to the Assistant Administrator for the Recovery Directorate the applicant's second appeal with a recommendation within 120 calendar days from the date of the Regional Administrator's first appeal decision. If the applicant or the recipient do not meet their respective 60-calendar day and 120-calendar day deadlines, FEMA will deny the appeal. If the Regional Administrator denies a recipient-related first appeal in whole or in part, the recipient may make a recipient-related second appeal within 60 calendar days from the date of the Regional Administrator's first appeal decision and the recipient must electronically submit their second appeal to the Assistant Administrator for the Recovery Directorate.

(B) Within 90 calendar days following receipt of a second appeal, if there is a need for additional information, the Assistant Administrator for the Recovery Directorate will provide electronic notice to the recipient and applicant. If there is no need for additional information, then FEMA will not provide notification. The Assistant Administrator for the Recovery Directorate will generally allow the recipient 30 calendar days to provide any additional information.

(C) The Assistant Administrator for the Recovery Directorate will provide electronic notice of the disposition of the appeal to the recipient and applicant within 90 calendar days of receipt of the appeal or within 90 calendar days following the receipt of



additional information or following expiration of the period for providing the information.

(iii) *Technical Advice.* In appeals involving highly technical issues, the Assistant Administrator for the Recovery Directorate may, at his or her discretion, submit the appeal to an independent scientific or technical person or group having expertise in the subject matter of the appeal for advice or recommendation. The period for this technical review may be in addition to other allotted time periods. Within 90 calendar days of receipt of the report, the Assistant Administrator for the Recovery Directorate will provide electronic notice of the disposition of the appeal to the recipient and applicant.

(iv) *Effect of an Appeal.* (A) FEMA will take no action to implement any determination pending an appeal decision from the Assistant Administrator for the Recovery Directorate, subject to the exceptions in paragraph (b)(2)(iv)(B) of this section.

(B) Notwithstanding paragraph (b)(2)(iv)(A) of this section, FEMA may:

(1) Suspend funding (see 2 CFR 200.339);

(2) Defer or disallow other claims questioned for reasons also disputed in the pending appeal; or

(3) Take other action to recover, withhold, or offset funds if specifically authorized by statute or regulation.

(v) *Implementation.* If the Assistant Administrator for the Recovery Directorate grants an appeal, the Assistant Administrator for the Recovery Directorate will direct the Regional Administrator to take appropriate implementing action(s).

(vi) *Guidance.* FEMA may issue separate guidance as necessary to supplement paragraph (b)(2) of this section.

(3) *Arbitration.* (i) *Applicability.* An applicant may request arbitration from the Civilian Board of Contract Appeals (CBCA) if:

(A) There is a dispute of the eligibility for assistance or of the repayment of assistance arising from a major disaster declared on or after January 1, 2016; and

(B) The amount in dispute is greater than \$500,000, or greater than \$100,000 for an applicant for assistance in a rural area; and

(C) The Regional Administrator has denied a first appeal decision or received a first appeal but not rendered a decision within 180 calendar days of receipt.

(ii) *Limitations.* A request for arbitration is in lieu of a second appeal.

(iii) *Request for Arbitration.* (A) An applicant may initiate arbitration by submitting an electronic request simultaneously to the recipient, the CBCA, and FEMA. See 48 CFR part 6106.

(B) *Time Limits.* (1) An applicant must submit a request for arbitration within 60 calendar days from the date of the Regional Administrator's first appeal decision; or

(2) If the first appeal was timely submitted, and the Regional Administrator has not rendered a decision within 180 calendar days of receiving the appeal, an applicant may arbitrate the decision of FEMA. To request arbitration, the applicant must first electronically submit a withdrawal of the pending appeal simultaneously to the recipient and the FEMA Regional Administrator. The applicant must then submit a request for arbitration to the recipient, the CBCA, and FEMA within 30 calendar days from the date of the withdrawal of the pending appeal.

(C) *Content of request.* The request for arbitration must contain a written statement that specifies the amount in dispute, all documentation supporting the position of the applicant, the disaster number, and the name and address of the applicant's authorized representative or counsel.

(iv) *Expenses.* Expenses for each party will be paid by the party who incurred the expense.

(v) *Guidance.* FEMA may issue separate guidance as necessary to supplement paragraph (b)(3) of this section.

(c) *Finality of decision.* (1) A FEMA final agency determination or a decision of the Assistant Administrator for the Recovery Directorate on a second appeal constitutes a final decision of FEMA. Final decisions are not subject to further administrative review.

(2) In the alternative, a decision of the majority of the CBCA panel constitutes a final decision, binding on all parties. See 48 CFR 6106.613. Final decisions are not subject to further administrative review.

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**Deanne B. Criswell,**

*Administrator,*

*Federal Emergency Management Agency.*

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